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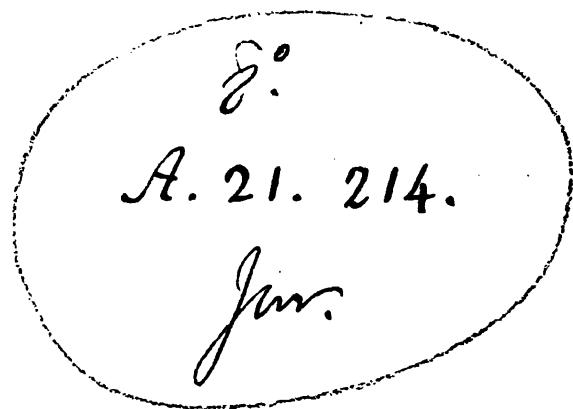
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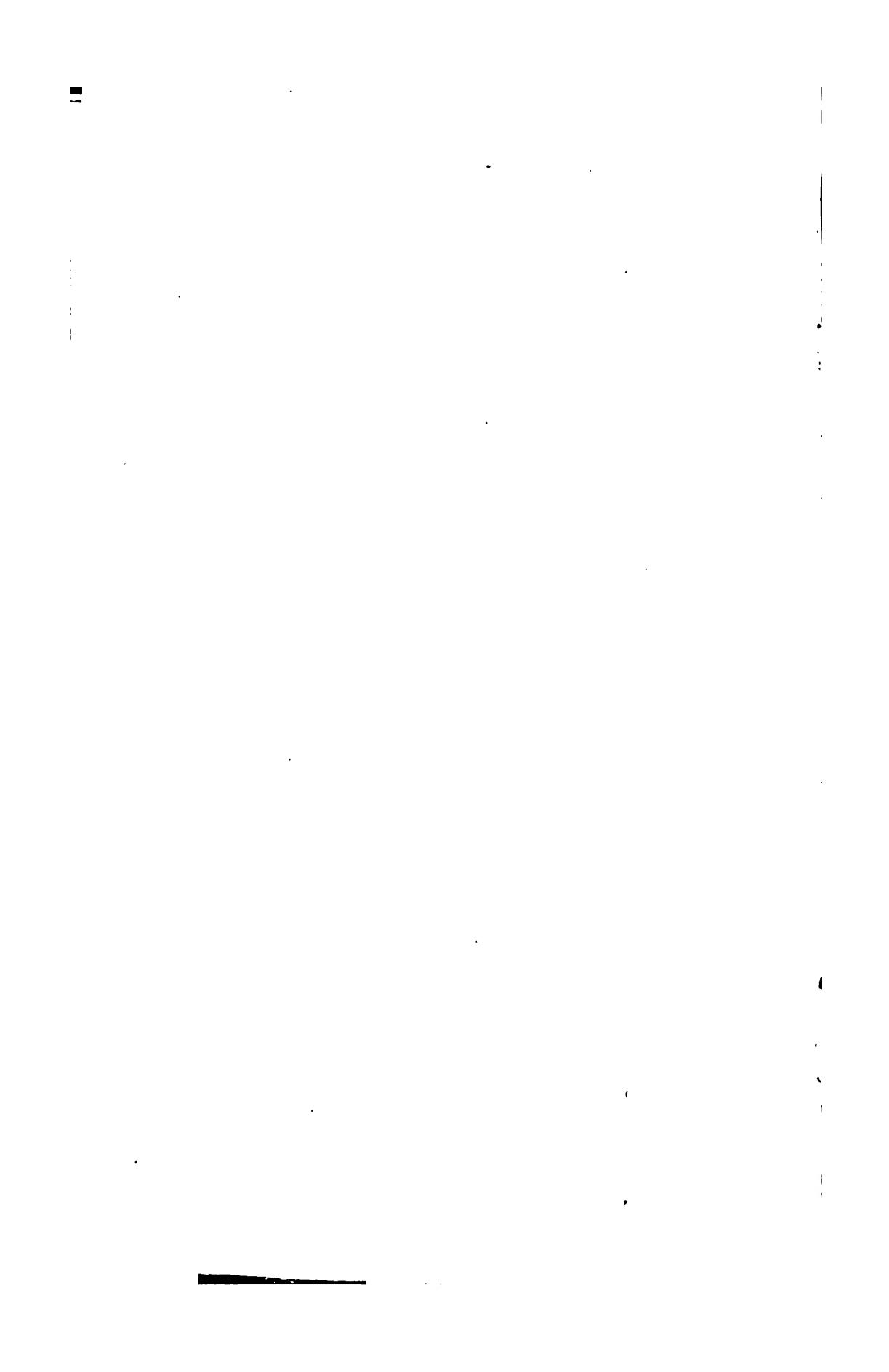
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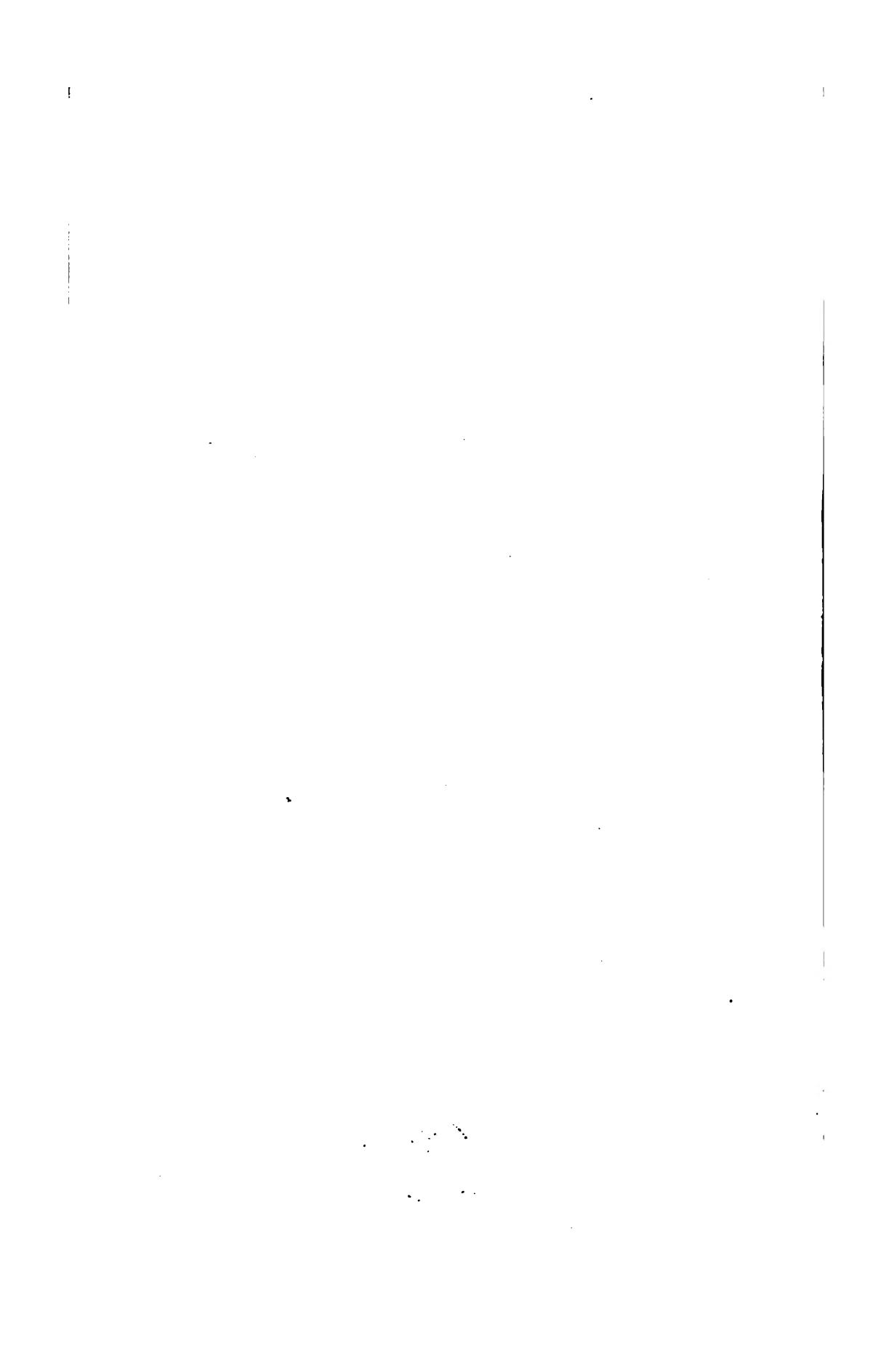




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TRUSTS AND TRUSTEES.



THE
PRINCIPLES AND PRACTICE
OF
THE LAW OF
TRUSTS AND TRUSTEES
IN SCOTLAND.

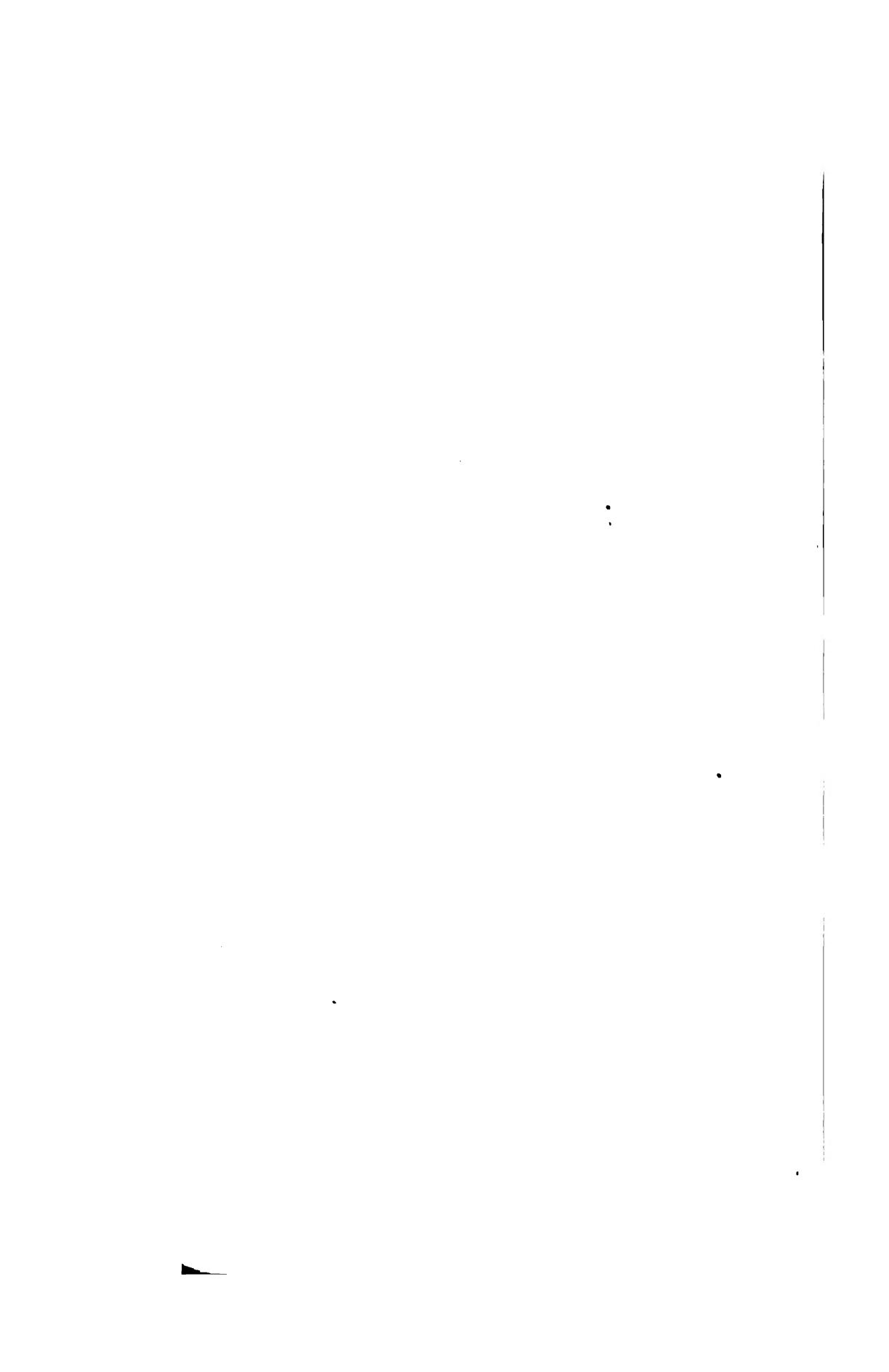
WITH
NOTES AND ILLUSTRATIONS FROM THE
LAW OF ENGLAND.

BY CHARLES FORSYTH, Esq.
ADVOCATE AND BARRISTER-AT-LAW

WILLIAM BLACKWOOD AND SONS,
EDINBURGH AND LONDON.

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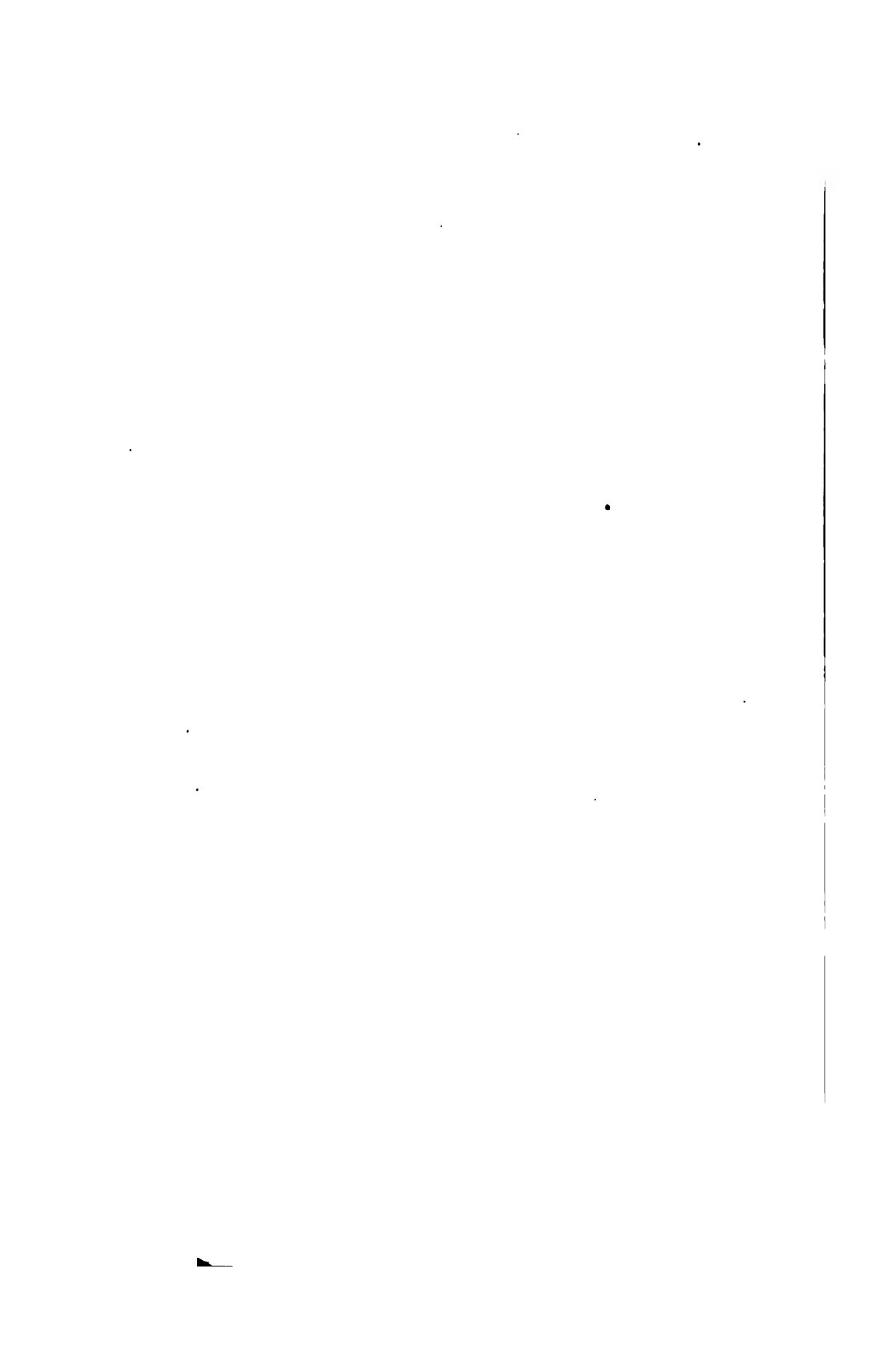


TO THE RIGHT HONOURABLE
THE LORD JUSTICE-CLERK,
LORD PRESIDENT OF THE SECOND DIVISION OF THE COURT OF SESSION.

During the period of whose eminent position, and great and perhaps unsurpassed experience, many of the most important questions tending to mature the law of trusts have been determined, this Treatise is, by his Lordship's permission, with sincere feelings of respect, and with a grateful sense of personal kindness conferred at an early period of professional life,

Inscribed by

CHARLES FORSYTH.



P R E F A C E.

IN offering this treatise to the profession, the object of the Author has been to state in a condensed form the law and practice of those trusts which are created by private individuals, with a view chiefly to the administration of their estates after their decease. Trusts of this nature, as a form of testamentary conveyance, have gradually become perhaps the most frequently adopted, as well as most important class of testamentary deeds. The devolving on friends the onerous duty of superintending the administration for behoof of others of the estate of a deceased party, necessarily imposes an office which is attended with difficulty, as its duties frequently extend over a series of years, during which, attention to a variety of matters, and the exercise of considerable discretion, become imperatively necessary. The nature of this office is such as to demand attention from those assuming it, to matters by no means occurring in the ordinary course of private affairs, and of questions requiring intimacy with legal rules, ignorance of which may give rise to serious liability. The author has therefore endeavoured at once to afford the means of readily obtaining such information, by non-professional parties, in a form as accessible as can be accomplished by a treatise necessarily involving legal ques-

tions of some intricacy, and at the same time by those whose office it is to give advice as to the important duties of trustees, and on whom, as conveyancers, in a great degree depends the perfecting and maturing of the law and practice of trusts, by a strict attention to the principles of legal interpretation as applied in practice.

Questions of trust of the description now under consideration are as purely matter of equitable jurisdiction as can characterize any extensive branch of a general system of jurisprudence. The principles or rules to be considered, therefore, are chiefly those of equitable interpretation as a special system, whether in questions relating to the rights of those for whose behoof such trusts are created, or to the powers, duties, or liabilities of those holding the office of trustee; with this qualification, however, that, as in all matters of equitable interpretation, wherever strict law has laid down a rule, that rule is imperative, whether in a question as to the power of the maker of the deed, or where consistent with the power, it is not inconsistent with declared intention. Such equitable principles may in general, where properly investigated, be clearly and systematically arranged. The want of such arrangement gives rise to much misconception, and unnecessary difficulty.

The matured principles, and great general practice of the law of England affords most valuable illustration, more particularly of a subject such as the present. But in applying these principles, it is a matter of no inconsiderable difficulty to determine in how far they are or can be identified with what, in a general

sense, is the corresponding branch of the law of Scotland. It must ever be kept in view in all such inquiries, that although it may be very truly said that the principles of justice are the same in all countries, that is true as regards the intended result of these systems only—the modes of arriving at that object, as in use in different countries, are widely different. The legal systems of England and Scotland are materially different in themselves. They are different in their character, and above all, they are materially different in their forms of practice, as administered in courts of justice. It has been laid down as an inviolable rule by Lord Eldon, (in *Stair v. Stair's Trustees*, 2 W. S. 622,) the most experienced judge who ever administered the laws of the two countries, that the laws of Scotland are not, in decisions or judicial proceedings, to be made similar to the laws of England—that is a purpose which can be accomplished only by legislation, and that is not to be attempted in the administration of justice. In these circumstances, therefore, principles and authorities drawn from the law of England have been chiefly arranged as notes or illustrations, in order that they may be clearly distinguished from principles having their origin in more direct and positive authority. With regard to these authorities themselves, the object has been to restrict them to such only as afford definite principles or rules apart from technical specialities. With this view, reference is generally made to the treatise on the law of trusts in England, by Mr Lewin, as being most comprehensive, and generally available for illustration.

PREFACE.

It may be proper to mention, that this work, although forming part of an intended work on the law of trusts generally, may be considered as a distinct treatise as regards the special subject considered.

The subjects to be afterwards treated of will consist of Executry and the interpretation of Wills, Guardianship, Principal and Agent, and Mandate in general.

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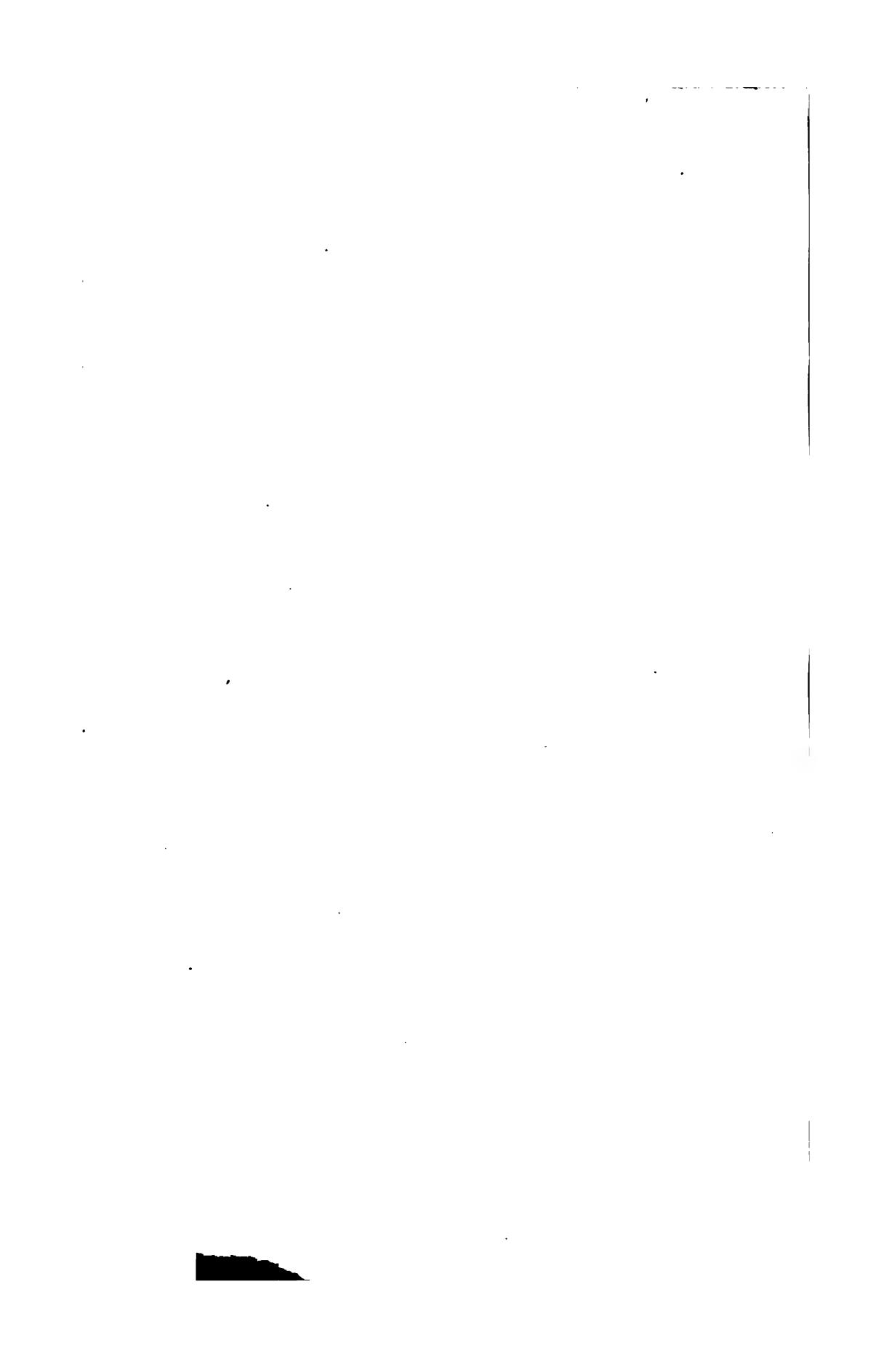
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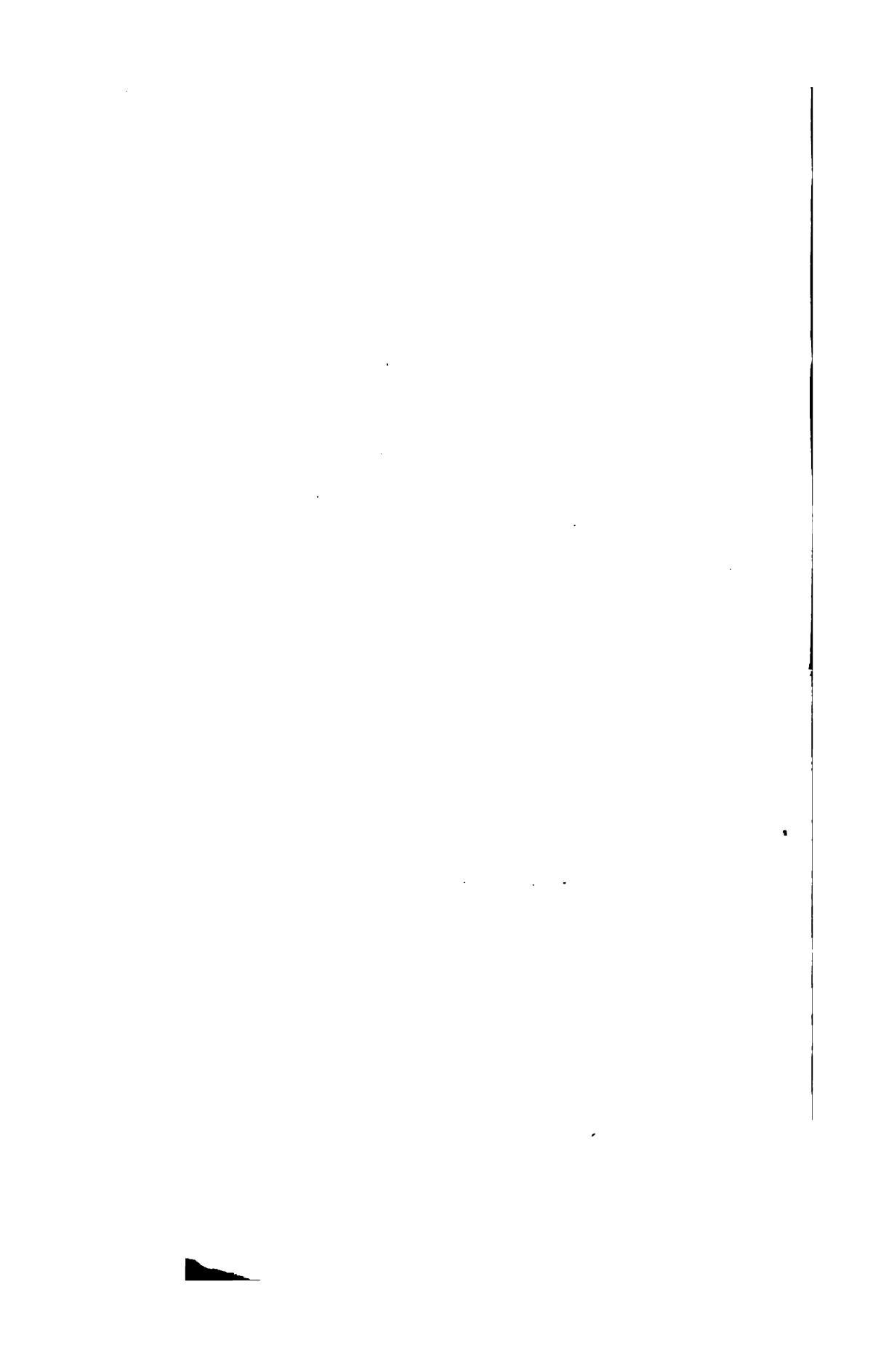
ERRATA.

- Page 34, Note 1, *for sect 4, read sect. 3.*
— 8, Side note, *for vivum read virum.*
— 86, Note 1, *for 10th Feb. read 9th Feb.*
— 106, Note 1, *for part 5 read part 4.*
— 107 Note 2, *for 145 read 14 S.*
— 153, *for part 3, read part 2*
— 175, Note 3, *for a. 4 ; read a. 3.*
— 211, Note 1, second line, *for 5 S. read 5 D.*
— 256, Note 1, first line, *for M. 9167, read 7167.*
— 266, Note 3, *for Blair, 28th Jan., 1836, 74 S. 161, read Blain, 28th Jan.*
1836, 14 S. 361.
— 405, Note 2, *for 13 S. read 14 S.*



PART I.
CONSTITUTION OF TRUSTS.

A



TRUSTS AND TRUSTEES.

CHAPTER I.

ORIGIN, HISTORY, AND OBJECTS OF TRUSTS.

TRUSTS, in the general sense of the term, include all cases in which, confidence being placed in another, authority is given to perform an act or acts for behoof of the party reposing that confidence. The part of this extensive and very important subject now to be specially treated of, consists of what in the civil law are termed *fidei-commissa*, as distinguished from mandate.

Trusts, as a form of conveyance, and mode of providing for the administration of property, have, in Scotland and England alike, had their origin in the civil law. The systems of the two countries, after passing through a variety of forms peculiar to each of them, have ultimately become very similar in their character and principles.

It being a rule of the civil law, arising from the nature of property, that no one could name an heir to succeed an heir; as the heir, whether by birth or

Trusts in general.
Trusts by deed.
Similarity of original character of trusts in England and Scotland. Originally derived from the civil law.

according to the civil law.

appointment, immediately on succeeding, became absolute proprietor, with full powers of disposal ; the only case of substitution allowed being that by a father of a succession to his son, in the event of the son dying before being of age to make a testament ; wherever a party was desirous of making a substitution, or declaring a trust for behoof of any one, he could only do so by trusting solely to the honour of the trustee. The importance of these *fidei-commissa*, as they were termed, and the abuses of them, were such as, in the time of Augustus, to render it necessary to allow an action to compel their performance in terms of the bequest ; and a prætor, or judge in equity, was therefore appointed to give judgment in such cases. It was at the same time enacted for their farther protection, that any party who was named fiduciary heir, that is, trustee, might be forced to accept, and to convey to the *fidei-commissarium*, or beneficiary ; and that a party who was alleged to hold property in trust might be put upon oath to prove the existence and nature of the trust. And in every respect trusts were highly favoured by the civil law, on account of the many obvious advantages attending them.

Trusts, according to the law of England.

The origin and progress of trusts in England, were not unlike those of the civil law. The strictness and narrow policy of the common law gave rise to the necessity of resorting to trusts for the purpose of acquiring the free power of alienation, settlement, and providing for the right administration of property ; as, from the party in whose favour the trust is established not being a party to the trust-agreement, he had not at common law any remedy against the trustee to fulfil the trust, although he

had so in equity ; whence trusts became matter of ^{Matter of equitable jurisdiction.} equitable jurisdiction. Another cause which like- wise led to their introduction, was the adoption of them by the clerical lawyers of the reign of Edward III., for the purpose of evading the restrictions placed upon the growing wealth of the church by ^{Introduced by churchmen.} the statutes of mortmain, which, as they prevented direct bequests to religious houses, were evaded by being taken to their *use* ; a maxim being established, ^{To evade the statutes of mortmain.} that although lands were not devisable by law, yet ^{Origin of uses.} if a party gave his lands to another,—but only to hold for the use of the party who gave them, whereby he who had originally the lands themselves, became only entitled to the use of them,—such use might be disposed of by his will. These uses, which were synonymous with trusts in the old law,¹ although put an end to, as regarded the church, by a statute in the reign of Richard II., were continued as a form of conveyance for various purposes; but being a departure from the rules of property established by ancient law, gave rise to innumerable subtleties, so as ultimately to become nearly incomprehensible, and to cause great injustice. The only security for the execution of trusts being thus, as in the civil law, the honour of the party intrusted, a writ in chancery was devised in the same reign, by which a trustee might be compelled to answer upon oath as to the existence and nature of the trust, and thereafter was compelled to carry it into execution ; this led to trusts being very generally adopted. Trusts and uses thus becoming subject to the rules which ^{Uses and trusts originally synonymous.}

¹ It may be observed, that the term “use” frequently occurs in the older Scotch decisions. It is there employed in the more limited sense, to denote a purpose of trust merely ; not as synonymous with trust as a general term.

courts of equity apply to alienations, gave rise to a state of matters utterly inconsistent with the feudal rules of property, as administered in the courts of law. This the legislature frequently endeavoured to remedy under the name of uses, and ultimately intended to extirpate, and in effect to restore to general adoption the old common law conveyances, by a statute in the reign of Henry VIII. commonly called the statute of uses, which carried out the principle previously acted upon in various statutes, of considering the cestuique use or beneficiary as the real owner of the estate, thus converting the interest of the cestuique use into a legal, instead of an equitable, ownership. But this statute proved insufficient to afford relief to parties in the courts of law, so that the nearly exclusive jurisdiction of the chancery revived again in full force. The effect of the statute, therefore, being to substitute for the ancient use, with its numerous defects, the modern trust, in which these evils have been avoided; and the ultimate result, as regards the position of trustees, is, that trusts originate either by express declaration, or from necessary implication, and create in those to whom they are confided, the various duties and liabilities, as laid down in the books.

**Statute of
uses. Inten-
ded to revive
common law
jurisdiction.**

**Revival of
chancery
jurisdiction.**

**Office of
trustee.**

**General
nature of the
rights of par-
ties under
trusts in
England.**

The general position of parties is, that the trustee holds an estate at common law, whilst the cestuique trust (beneficiary) holds an estate in equity. As regards the common law, the legal estate in the trustee has precisely the same properties and incidents as if the trustee were the owner.¹ The interest of the cestuique trust, is a

¹ Lewin on Trusts, 202.

positive and vested equitable right ; he has the *jus habendi* and *jus disponendi* ;¹ which right, therefore, is only recognized in a court of equity, the cestuique trust being merely a tenant at will or sufferance, in a court of common law.² But as the effect of a deed or will is to be ruled by intention, the legal interest is measured by the scope and object of the equitable interest.³ The relative position of the trustee, and cestuique trust, may be exemplified by this, that whilst the cestuique trust, in disposing of the trust-estate, must call upon the trustee to execute the conveyances,⁴ in trusts for sale, the *prima facie* rule is, that if an estate be vested in A, upon trust to sell and divide the proceeds between B and C, in a court of law, the absolute ownership is in A, and his receipt, therefore, will discharge the purchase ; but in equity, B and C, the cestuique trust, are the true and beneficial proprietors, and A is merely the instrument for the execution of the settler's purpose. The receipt, therefore, to be effectual, must be signed by B and C, unless that rule be controlled or defeated by an express or implied intention to the contrary, collected from the instrument creating the trust.⁵ And again, also in consequence of the separation of the equitable and legal estates, under the English statutes of bankruptcy,⁶ and where the trust is constructive, and only a doubtful equity, the legal property will pass to the assignees of the trustee ; for the statute vests in them every pro-

¹ Smith v. Wheeler, 1 Mod. 17, per. J. Pemberton.

² See Geary v. Bearcroft, O. Bridg. 486—490. Bacon on Us. 5. ¶

³ Lewin on Trusts, 194.

⁴ See Jones v. Lewis, 1 Cox, 199 ; Saunders v. Neville, 2 Vern. 428.

⁵ Lewin on Trusts, 342, 352, 353. See *inf.* part 2, c. 7.

⁶ 6 Geo. IV. c. 16, § 63 and 64 ; and 2 Will. IV. c. 56, § 25 and 26.

perty,¹ where there is the remotest possibility of any benefit to the creditors.² But only the legal property passes, and the cestuique trust has the same relief in equity against the assignees as he would have been entitled to against the trustee (bankrupt) himself.³ So also under the insolvent act,⁴ by which all the real and personal estate of the prisoner is made to rest by his conveyance and assignment in the assignee, which, as they substantially follow the provisions of the bankruptcy act, are, in analogous cases, governed by the same construction. In judgments against the trustee, likewise, which, in so far as they affect lands, derive their effect from statutory enactments,⁵ the cestuique trust is protected from the legal process by application to a court of equity.⁶ Whereas in Scotland, in the case of trusts by absolute conveyance, and a back bond of trust, which is the most similar to trusts of real estate in England, the private back bond would not be good against *bona fide* onerous third parties' creditors of the trustee, the property would merge in the general estate of the bankrupt, and the beneficiaries could only rank upon that estate as ordinary creditors.

¹ *Bennet v. Davis*, 2 P. W. 316; *Taylor v. Wheeler*, 2 Vern. 564; *Carpenter v. Marnell*, 3 B. P. 40.

² *Carpenter*, *ut sup.* 41.

³ *Bennet*, *ut sup.*; *Taylor*, *ut sup.*; *Mitford v. Mitford*, 9 Ves. 100, per Sir W. Grant. *Ex parte Dumas*, 2 Ves. 585, per Lord Hardwicke; *Hinton v. Hinton*, 2 Ves. 633, per eundem; *Grant v. Mills*, 2 V. and B. 309, per Sir W. Grant; *Tyrrell v. Hope*, 2 Atk. 558; *Bowles v. Rogers*, 6 Ves. 95, note (a.) *Ex parte Hanson*, 12 Ves. 349, per Lord Eldon. *Ex parte Herbert*, 13 Ves. 188; *Waring v. Coventry*, 2 M. and K. 406. See also Lewin on Trusts, 216.

⁴ 7 Geo. IV. c. 57, § 11.

⁵ 11 E. I. 13 E. 1, st. 1, c. 18. 13 E. 1, st. 3. 27 E. 3. st. 2. c. 9, see Co. Lit. 289, b.

⁶ *Finch v. Earl of Winchelsea*, 1 P. W. 277; *Burgh v. Francis*, 1 Eq. Ca. Ab. 320; *Medley v. Martin, Finch*, 63; *Prior v. Penpraze*, 4 Price, 99.

In Scotland, the origin of trusts is coeval with the law of the land. For being a part and portion of the civil law, on which the law of Scotland is based, they were necessarily introduced along with it by the churchmen, the lawyers of the earlier periods, the influence of the civil law being rather strengthened than impaired by the introduction of the Court of Session, which was formed on the model of the parliament of Paris, where the civil law was also administered. It is, therefore, clear, ^{At all times enforced when proved.} that trusts were at all times enforced in Scotland, when their existence could be established by evidence ; but as confidential transactions of that description were often entered into without formality, or communication with third parties, the courts of justice frequently found much difficulty in ascertaining the true nature of proceedings inferring a creation of trust. To diminish or supersede such difficulties, the statute 1696, c. 25, was enacted, ^{Act 1696 c. 25.} declaring that trusts should be capable of proof by writ or oath of party only. The terms of the statute demonstrate the correctness of the statement, that trust, when undertaken and established by proof, was at all times enforced by the courts of law in Scotland ; and hence it was, that in the history of Scottish jurisprudence, no room occurred ^{Free from the subtleties of the English law.} for such subtleties, as in England arose from the attempts of the church to evade the restrictions imposed upon its acquisition of property.

Nor does the system of feudal tenures appear to have operated to any very important extent as a check to such dispositions. The restraint upon the power of alienation imposed by the system of ward holdings, and also in some instances in feu holdings ^{Effects of the feudal system upon trusts. Not of serious importance.}

in early times, were not sufficient to do so. The introduction of the less restricted forms of feu, blanch, and burgage holdings, combined with the immense mass of property acquired by the church, amounting to nearly half the territory of the state, and the tithes of the remainder, which was acquired by the nobles and gentry at the Reformation by irregular titles, sales by the church, alienations by the crown, in disregard of statutes of annexation and otherwise, which titles were ultimately confirmed, all combined to render the power of alienation by the possessor, in the form of trust or otherwise, free and unlimited. Ward holdings were not abolished until the 20th of Geo. II.; but we find reported cases as to trust as early as the beginning of the seventeenth century. They appear to have been used in Scotland, at a very early period, as a means of securing estates against forfeiture, in periods of rebellion and civil wars, by vesting estates in relatives or friends not engaged in these, in order that they might be restored to the party making the trust, or to such of his direct descendants, or nearest kinsmen, as should be in a condition to hold the estate. These trusts were either constituted by simple deed,¹ or otherwise. As, for instance, by a party with a view of disappointing his forfeiture, and saving a sum of money to his children, discharging a bond due to him upon the debt, or granting a new bond, payable to a third party, in trust for behoof of the forfeiting

Used in
periods of re-
bellion and
civil war.

¹ See Beaton, 21st June, 1737, M. 1150; Creditors of Struan, 2d Dec. 1755, M. 4672; Inglis, 26th Nov. 1724, M. 4757; Drummond, 18th July, 1749, M. 4874.

party's children.¹ Or by the party, or another for his behoof, conveying an estate to some one, to be redeemable by the trustee or beneficiary, on the payment of a nominal sum, as a rose noble.²

Trusts were also used, at an early period, for evading the effect of civil diligence for debt, by which, where a party was put to the horn, as it was called, he was declared a rebel, and his estate forfeited.³ It was to accomplish the same object, that the nobles and gentry of Scotland obtained the statute 1685, authorizing entails to be made, so as to prevent the forfeiture of estates farther than against the individual convicted of high treason, and the parties claiming the succession through him, as in such cases a trust, if discovered, would have failed.

There is this distinction between the principle of the civil law, and the law of Scotland, in relation to the history of trusts, that in the civil law, originally, trusts were not enforced against the heir, and heirs were of two kinds, legal or testamentary. In either case, a request addressed to an heir might be safely disregarded, till in the time of Augustus, as already mentioned, authority was given to a special judge or court to enforce trusts imposed upon heirs, or to oblige trustees, or *fidei* commissary heirs, to fulfil the instructions given by the testator. In Scotland, however, every heir is, in legal construction, an heir-at-law, so far as lands are concerned, and there is no such thing as a testamentary heir, properly so called. The rule is, that God only makes an heir. A party

¹ The King's Advocate *v.* Blair, 12th June, 1750, M. 4969.

² Forbes, 5th March, 1756, M. 4675.

³ Veitch, 10th Dec. 1678, M. 8367; Hamilton, 22d June, 1669, M. 16169.

And to evade
the effect of
civil diligence.

Similar to
origin of
entails.

Distinction
between prin-
ciple of civil
law, and law
of Scotland,
as to the his-
tory of trusts.
Difference as
to the import
of the term
heir.

intending to disinherit his heir, can accomplish his object only by rendering the estate unprofitable. He may convey his lands to trustees, or other favoured parties; but such are not heirs, but dispossessors, and the deed of conveyance must be executed in the form of a disposition *inter vivos*, or of an obligation binding the proprietor to convey. The heir-at-law is still legal successor to the estate, but he may be compelled, by an action, to fulfil the deed of his predecessor by granting a conveyance; or, a decree to convey being obtained against him, the courts of law will adjudge the estate in implement of that obligation, and the favoured party will thereupon obtain a charter from the crown, or other superior. It is in this way that *mortis causa* conveyances to trustees are enforced in Scotland, when the trust-deed does not contain clauses enabling the trustees to go directly to the superior for a charter. Moveables may also be conveyed in trust, but executors named in a will are the proper trustees in that species of property.

General
nature of the
rights of par-
ties under
trusts in
Scotland.

The right of the beneficiary has never in Scotland been acknowledged as a positive, vested, equitable, and co-existent right, as distinguished from the legal right of the trustee, as in England; but merely as a personal right of action against the trustee, to fulfil an obligation undertaken for behoof of him, the beneficiary; the actual right of property being in the trustee alone, but for the purposes declared in the trust-deed. But notwithstanding that the formal right or title is usually vested in the trustee by the law of Scotland, and he is thus legally proprietor of the trust-estate, it is a right or confidence personal to him; and which, therefore, does not pass to his

How enforced
against heirs
in Scotland.

heirs or successors, unless it be specially so declared by the trust-deed. If the conveyance be absolute in favour of the trustee, and the declaration of trust be contained in a separate deed by the trustee, then, as the absolute feudal title is in the trustee, it will pass to his heirs ; and therefore they must be divested of it. But if in the form of a deed, bearing the declaration of the trust by the grantor, and *ex facie* of the deed, it falls on his death. Whereas, in the law of England, although there be two co-existent rights in the estate,—the positive legal right in the trustee, and the vested equitable right in the cestuique trust,—the forms and nature of their constitutions are so distinct, that the trust, whether of real or personal estate, may, like a beneficial estate, be conveyed, assigned, or encumbered by the trustee, at law ; and if there be co-trustees, each may exercise the like powers of ownership over his own proportion ; and, as the trustee may dispose of the property in his lifetime, so he may devise or bequeath it at his death.¹ And in order to make his equitable right effectual against the vested legal right of the trustee, the cestuique trust must pursue the trustee in a Court of Equity, to fulfil the purposes of the trust-conveyance ; and the chancery will, if necessary, enforce the performance of them, by commitment of his person, or sequestration of his estate.²

¹ See Lewin on Trusts, 205, &c. and cases there cited.

² In investigating the law of England, with a view to illustration, &c. in addition to the cases referred to in this treatise generally, reference may be made to the following works. Gilbert on Uses, (by Sugden.) Bacon on Uses. Saunders on Uses and Trusts. Fonblanche on Equity. Powell on Mortgages. Sugden on Powers. Jeremy's Equity Jurisdiction. Maddock's Chancery Practice, &c.

14 ORIGIN, HISTORY, AND OBJECTS OF TRUSTS.

Purposes of trusts.

The purposes to which trusts are usually applied in Scotland, are marriage and other family settlements, the conducting of a particular branch of trade, or business of any kind, joint-stock companies, or the extrajudicial settlement of embarrassed or bankrupt estates. And the requisites for the constitution of such trusts are, the party constituting the trust, the act of constitution, the party constituted trustee, the subject transferred, the purpose or object to be attained by it, or party beneficially interested, that is, for whose behoof it is created, and the vesting of the estate in the trustee.

Requisites for the constitution of trusts.

CHAPTER II.

WHO MAY CONSTITUTE A TRUST, AND THE LIMITATIONS OF THAT POWER.

THE general rule as to the creation of trusts is, General rule. that any party may make a trust over property of which he has the free power of disposal. This rests upon the simple principle that the right of property includes the right of alienation, which last can only be counteracted by special exceptions or limitations legally created. Thus, a party can only convey in trust the interest which he has in himself, as in the case of liferent, where the profits alone can be conveyed, for liferent *hæret ossibus*. So also in an entail, where the liferent interest can alone be conveyed, unless for the purpose of trying the validity of an entail, which is akin to the conveyance of a right in expectancy.

A sentence of outlawry does not deprive a party Outlawry. of the right of disposing of his property in trust. Thus, where a party executed an *ex facie* absolute disposition of his heritable property, but which the donees afterwards declared, by a separate deed, was held in trust for the grantor, his heirs, and donees, and he was afterwards cited to appear before the court of justiciary for murder, alleged to have been committed previous to the date

of the disposition, and, on his not appearing, sentence of fugitation had passed, and denunciation followed thereon and was recorded, and some years afterwards, when still under outlawry, he made a deed directing his trustees to execute a strict entail of his property in favour of certain parties, which was accordingly done, and after his death recorded by the trustees. In a challenge of the entail by the heir-at-law it was held, that the entail and subsequent registration were valid and effectual, in respect that a sentence of outlawry does not deprive a party of the right of absolute disposal of the fee of his property.¹

Bastardy. Bastardy is no legal disqualification for making a trust-deed.

Marriage. A trust-conveyance of heritage, or of her *peculium*, by a married woman, is effectual if granted with concurrence of her husband, or if conveyed under conditions expressed in her marriage-contract. Such conveyances will be valid as regards the property conveyed, but will be totally ineffectual as regards all personal obligations on her own part. But a *mortis causa* conveyance by a married woman of such moveables as she shall have a right to, is effectual without the consent of her husband.

High Treason. A conviction of high treason will disqualify a party for creating a trust.

Minority. A minor may make a testament creating a trust over moveable property, but he cannot dispose of heritage.

Bankruptcy. Bankruptcy, when legally declared, is a disqualification for constituting a trust. The mere existence of debt is not sufficient to do so. Conveyances

¹ Macrae, 22d November, 1836, 15 S. 54, and Append. 1312; Aff. 1 Robin. App. 645.

in trust within sixty days of notour bankruptcy, are reducible on the act 1696, c. 5.¹ Before obtaining aliment or liberation from jail in virtue of a decree of *cessio bonorum*, a bankrupt may be compelled to execute a conveyance of his property to a trustee, or trustees, named by his creditors.²

By the act 1621, trust-deeds are not valid when begun diligence.³ in defraud of begun diligence of creditors.³

Inhibition is a disqualification in a question with inhibition. the inhibiting creditor.⁴

Insane persons, although not cognosced, are in- insanity. capable of creating trusts, but may do so during the existence of a lucid interval.

Facility is a good ground of reduction of a trust- Facility. deed, though the deed or deeds shall not have been obtained by undue influence of the parties in whose favour they were granted.⁵

Any conveyance in trust to the injury of an death-bed. heir, when made by a person ill of the disease of which he died, and within sixty days of his death, or if he do not go to kirk or market, is reducible under the ordinary rules of the law of death-bed in Scotland.⁶

Corporations, constituted by patent or act of parliament, and subordinate corporations constituted by royal burghs,⁷ or by superiors of burghs Corporations, joint-stock companies, and other communities.

¹ See Wright, 7th March, 1839, 1 D. 641.

² See M'Gowan, 21st Jan. 1836, 14 S. 314.

³ See Grant, 6th Feb. 1835, 13 S. 424.

⁴ Cruttenden, 2d Dec. 1824, 3 S. 347.

⁵ Watson, 18th Nov. 1825, 4 S. 200; Do. 8th Feb. 1825, 3 S. 511.

⁶ See Craiga, 3d and 13th Feb. 1739, M. 3199; Murray's, 5th Dec. 1797, M. 3237; Irvine, 3d June, 1808, M. Death-bed, App. No. 6; Murray, 21st Jan. 1826, 4 S. 374. But see M'Kay, 17th Jan. 1828, 6 S. 367; Irving, 3d June, 1808, F; and see part 1, c. 3.

⁷ See Grant, 5th June, 1747, M. 1097.

of barony, in virtue of a power in their charter, or, even where no charter can be produced, from the prescriptive possession, and exercise of corporate rights,—are considered as political persons. They have their own proper stock, and the same rights and privileges as individuals have; and may, therefore, make similar transferences in trust. Voluntary associations of tradesmen have no *persona standi in judicio* to enforce any acts done by them; and, therefore, any appointment of a party to act for them, in the capacity of trustee, would not be acknowledged in law. But societies established under the regulations of 33 Geo. III. c. 54; 49 Geo. III. c. 125; 10 Geo. IV. c. 56, may appoint trustees to manage their affairs, in whom their property may be vested, and at whose instance all legal acts may be done. Religious communities, or societies for the purpose of erecting, carrying on, and supporting dissenting chapels, have also the power of appointing trustees to manage their affairs, and in whom their property may be vested.¹

Persons out of
Scotland.

Persons in another country may make trust-deeds which will be effectual in Scotland, provided, that if of moveables, they are written in such a form as would be sufficient for transferring such property in the country in which they are made; and that if of heritage, such conveyances are in the form necessary to transfer heritage in this country. Thus a trust conveyance of heritage, in the English form, although sufficient to transfer such property in that country, is insufficient to do so in Scotland, where a *de praesenti* conveyance is necessary.²

¹ See part 3, c. 7.

² See part 1, c. 6.

CHAPTER III.

CONSTITUTION OF PROPRIETORY AND ACCESSORY TRUSTS.

PRIVATE trusts, as regards their constitution and character, are of three kinds : 1st, Proper, or proprietary trusts, that is, trusts created by regular trust-deeds, by which the trustee is invested with the trust-estate, and is actual proprietor in the eye of the law, but burdened with a trust. 2d, Accessory trusts, that is, trusts created by deeds, the primary object of which is not the creation of a trust, and by which the trustee is not invested with the property. 3d, Trusts by operation of law.

SECTION I. — PROPRIETORY TRUSTS.

AFTER the statute 1695 was enacted, the form adopted of constituting regular and formal trusts, was by an absolute disposition and back bond. The form of which is, that the trustor conveys the property to the trustee, by a deed *ex facie* absolute, whereby, so far as the public are concerned, the trustee is the unlimited proprietor of the subject. On the other hand, and as a counterpart, the trustee grants a bond in favour of the trustor, binding

himself to fulfil all the purposes on account of which the estate was conveyed to him, such as to pay debts or legacies, advance money, entail an estate, &c. Such back bond, therefore, being latent, cannot affect third parties ignorant of its existence.¹ This ultimately gave rise to the form of disposition by trust-deed, now adopted in practice, which is the proper form of constituting such conveyances, when meant to be made public.

In constituting or creating a formal trust, the first point to be considered, is, the nature and situation of the fund meant to be placed under trust.

1. Supposing the fund to consist of the whole heritable, and of the whole personal estate of the trustor, it is only necessary to execute a deed of conveyance in the form of an ordinary deed of alienation, which the law of Scotland will hold effectual, with this peculiarity, that the conveyance must be declared *in gremio* to be granted and received for the purposes therein after mentioned, which the trustees, by acceptance of the conveyance, undertake to fulfil.

Under the law of Scotland, every direct and effectual conveyance of lands, tenements, money, heritably secured, and other heritable rights, must be granted by words of present alienation, such as, *I give, grant, and dispone*, although the granter, by reserving his liferent, or by an express declaration in the deed, may fix the term at which it is to take effect, and whether it is to be revocable or irrevocable. Thus it is not competent to burden heritable property with provisions to younger chil-

¹ See *inf. part 2, c. 7.*

dren, in a trust-deed, in the form of a last will and testament.¹ But the terms in which heritage is conveyed in trust must, however, be very specific, as, "I hereby give, grant, and dispone," &c., all "lands and tenements." Thus a *mortis causa* deed, whereby the trustor "gave, granted, assigned, and freely disponed" to the trustees, named all his "goods, gear, means, and effects, heritable and moveable," was held to be a disposition, and not a testament; but, upon the general principle that heritage is not understood to be conveyed, unless positively expressed, it was held insufficient to convey a proper heritable subject.² But a disposition by a party, "of all estate whatsoever, personal and real," in trust, for the heirs of his entail, was held to comprehend all lands whatever belonging to him.³ In moveables, or personal rights, the proper terms of ~~of moveables.~~
alienation are, *I hereby assign, and make over*; but in the case of deeds to take effect at a future period, it may happen, that in the interval, money may be lent on heritable security, and therefore, to avoid ambiguity, or difficulty, the words *grant and dispone* should be added to the term *assignment* of moveables.

In other respects, the clauses for granting infestation in favour of trustees ought to be inserted as in ordinary deeds of alienation, and the usual clauses of registration and attestation added, and they are subject to the general rules applicable to the constitution of probative deeds. Thus, for instance, in regard to testing,⁴ (trustees, however, having no

Clauses of
trust-deeds.

¹ 1 Govan. 28th Jan. 1812, F.

² Brown, &c., 26th Jan. 1770, M. 5440.

³ Drummond, 17th July, 1782, M. 2313.

⁴ See Earl of Fife, 22d Dec. 1825, 4 S. 335; Condie, 26th June, 1828, 2 S. 432.

personal interest, being competent witnesses to the deeds by which they are appointed ;¹ erasures²—delivery³—execution by party, with or without notaries, &c.⁴ And all trust-deeds, coming under the denomination of blank writs, in terms of the act 1696, c. 25, are void.⁵ As to the purposes of the trust, they are to be specially and articulately mentioned in the deed, as, whether for family settlements⁶—to pay debts⁷—for charitable or benevolent purposes, &c.⁸ A clause for the protection of trustees against hazardous liability for negligence, may be added, (if thought proper,) the import and effect of which provision, will hereafter be considered.⁹

Subject to
general rules
as to constitu-
tion of proba-
tive deeds.
Purposes.

Protecting
clause.

Mode of con-
veyance
where trust-
estate not in
possession of
trustee.

2. It may happen, that the fund meant to form the subject of a trust is not in possession of the trustee, but of a third party. The person who is truly the trustee may have purchased, and is about to pay, the price of a land estate, which he intends to settle, by entail or otherwise, upon himself and a series of heirs. In such a case, the trust-fund being the land estate, is in possession of the seller. On receiving payment of the price, the seller may be directed to subscribe a deed, conveying the estate to the purchaser, or other party favoured by him,

¹ Mitchell, 30th Nov. 1742, M. 16900.

² See Earl of Strathmore, 24th May, 1833, 11 S. 644. Do. 1st Feb. 1837, 15 S. 449; Morrison, 30th June, 1829, 7 S. 810; Gaywood, 19th June, 1828, 6 S. 991.

³ Lady Ramsay, &c. 11th July, 1833, 11 S. 967; See also, Elphiston, 24th Jan. 1679, M. 16176; Drummond, 18th July, 1748, M. 4874.

⁴ Reid, 7th July, 1835, 13 S. 1063.

⁵ Pentland, 22d May, 1829, 7 S. 640.

⁶ See Pentland, *ut. sup.*

⁷ See part 1, c. 4; part 3, c. 8.

⁸ Ewen, 5th Feb. 1828, 6 S. 479, and *inf.* part 3, c. 6.

⁹ For the forms or styles of such deeds as are generally used in practice, see Juridical Styles. Duff on Deeds.

under any conditions or limitations that he may approve of; or the deed may convey the estate to a trustee, or trustees, to be held for any purpose that the purchaser may think fit. In this last case, the seller is nominally and apparently, but only nominally, the trustee—a character which truly belongs to the purchaser.

Another case often occurs. A party may have directed an agent to purchase government stock on his behalf, or to lend money, or buy land. On account of the absence of the moneyed party, and with a view to management, the stock may have been bought, and the money lent, and land purchased, all in name of the agent, acting ostensibly for his own behoof, while, in reality, he is merely a trustee, acting for behoof of his employers.

In such a case, the employer ought to obtain written evidence of the state of the fact. The law of Scotland has declared, generally, that in such cases the trust can only be proved by the writ or oath of the alleged trustee. The regular form of proceeding, in such a case, between the principal and the agent, is, that the latter should grant what is styled a declaration of trust, that is, a deed or written document, explanatory of the state of the fact. Such a document may be executed in any form held probative by the law of Scotland.¹ This species of trust does not, however, belong to the class of trusts here specially to be treated of, but to that of business trusts.

The form of constituting trusts, by absolute disposition, qualified by a back bond, is still frequently

Where pro-
perty acquired
by agent.

Evidence of
employment.

¹ See part 1, c. 7.

For what purposes trust, by absolute disposition and back bond, still adopted.

adopted in practice. This form has the advantage of enabling the trustee more easily to transact with third parties, and, in particular, to make sales of land, and to execute conveyances unencumbered by any reference to the conditions of the trust. In such cases, however, the trustor retains nothing more than a right of personal action against the trustee, to compel implement of the conditions of the trust. Whereas, in the case of trust-deeds containing, *in gremio*, the conditions of the trust, third parties are put upon their guard, and cannot, *bona fide*, enter into transactions with the trustee inconsistent with the powers conferred on him by the trust-deed. Hence, trusts constituted by absolute disposition and back bond are, in practice, generally used for the purpose of borrowing money from, or obtaining credit through, a particular individual, in whose permanent solvency full confidence is reposed. They have this advantage in such cases, that the money lender may, on the security of the absolute conveyance which he holds, make additional advances, from time to time, as he cannot be compelled to redispone till indemnified for all his advances.

Alteration of the purposes contained in trust-deeds. Reserved powers.

Effect of

It is usual and proper in trust-deeds, to reserve a power of alteration and destination, with a view to future directions to trustees, or alterations as to purposes.¹ Such reservations, however, are not necessary in undelivered testamentary deeds. Directions, or alterations under reserved powers, are effectual, notwithstanding that the trustee is infest, and has thereby the feudal right in the property affected by the reserved power.² They do not

¹ See Fergusson, 20th June, 1828, 6 S. 1006.

² Anderson, 24th Dec. 1784, M. 4128.

require the same formalities, and are not subject to the same strictness as to proof, which attend trust-deeds themselves. They must, however, be probative writings, which sufficiently declare the will of the trustor. Thus, in virtue of such reserved power, the purposes of a trust relative to heritage may be declared by testament, where the previous trust-deed is an effectual conveyance of the heritable subjects mentioned therein.¹ And any holograph writing, whether in the form of a letter,² or a simple statement of the purposes to which the funds are to be applied,³ is sufficient, and although the signature of the grantor be not exhibited in the regular form necessary in formal deeds.⁴ A codicil, or other subsequent declaration, will not be effectual, notwithstanding such reservation, where it is only subscribed by the trustor, and not holograph, or duly tested;⁵ or where not holograph, is not wholly complete as a probative writ.⁶ And although otherwise complete, it must also be distinctly addressed to the trustees under the trust-deed in question; and will not be sufficient, if addressed to another set of trustees, whose appointment has failed to take effect.⁷ Such subsequent declaration of purposes must also be contained in a writing, in itself an actual and distinct authority or direction to enforce the

Less strict in point of form.

Must be probative.

Property addressed.

Contained in a writing giving proper authority to trustee.

¹ Willock, 14th Dec. 1769. M. 5539, Aff. on App. Brack, 23d Nov. 1827, 6 S. 113. Kid, 9th June, 1843, 5 D. 1137.

² Barclay, 4th March, 1830, 8 S. 632.

³ Ballantine, 17th Jan. 1838, 16 S. 825; Panton, &c. 22d Jan. 1824, 2 S. 632.

⁴ Gillespie, 22d Dec. 1831, 10 S. 174.

⁵ Dundas, 13th May, 1807, M. Writ, Append. No. 6.

⁶ See Dempster, &c. 15th Nov. 1799, M. 16947. But see M'Intyre, 1 Mar. 1821, F. which seems a doubtful decision.

⁷ Stewart, &c. 27th Jan. 1841, 3 D. 463.

purposes contained in it. Thus, where a party executed a trust-deed for behoof of such persons as he might appoint by any writing under his hand, though informal—and also a deed of settlement in reference thereto, reserving full power to alter—and afterwards gave holograph instructions, signed by himself, for preparing a new deed of settlement, the draft of which was sent to him when confined to bed by indisposition—and he having been seized shortly thereafter with a severe illness, of which he died without having executed any regular deed, or initialed the draft,—it was held, notwithstanding the reserved power of alteration, and immediate illness and death, that the holograph notes were not effectual, as not being a sufficient declaration of will.¹

An alteration, amounting to a revocation of a purpose, or provision of a trust, may be made either by positive declaration, as above stated, or by an act on the part of the trustee amounting to a revocation. Thus, where heritable subjects were conveyed, under burden of a sum, to the trustee's son, power to alter being reserved, and the heritable subjects were afterwards sold by the trustee, by whom the personal bond was received for the price, which bond was by him assigned to a creditor, a note being taken for the balance,—a claim against the trustees being made by the son for payment, the settlement was held revoked by the alienation.² Or a provision in a trust-deed may be annulled or discharged by prepayment by the testator of a sum equal to the provision in the deed.³ And a trust-

Revocation
may be pre-
sumed from
acts of trustee.

And a provi-
sion dis-
charged by
prepayment.

¹ Stainton, 17th Jan. 1828, 6 S. 363; Munro, 3d July, 1818; 1 Dow. 437.

² Paul, 5th July, 1821, 1 S. 100.

³ Pagan, 26th Jan. 1838, 16 S. 383; Robertson, 15th Feb. 1838, 16 S.

deed may be revoked by a subsequent marriage-contract, the provisions of which are inconsistent therewith.¹

A trust-conveyance for behoof of persons not heirs of the testator, is not revoked by a posterior gratuitous destination to heirs and assignees, though inserted in a marriage-contract.² And the deletion, by the testator, of the names of some out of several trustees, is not sufficient to annul a trust-deed.³ The question has been discussed, but not decided, whether a trust-deed revoking all former deeds, being burnt by the testator, can be revived to the effect of operating a revocation of a previous deed.⁴

Thus far, therefore, as regards the exercise of a reserved power of revocation or alteration, the intention of the testator is to be liberally interpreted, so as to carry it into effect where that purpose is sufficiently known. In the law of England, where a man makes a voluntary settlement, and reserves a power to himself, it will, it seems, be construed liberally, and the courts will be anxious to seize on any words which may be deemed an execution of the power.⁵ Thus, in the case of *Maddison v. Andrew*,⁶ in a voluntary settlement, the granter

⁵⁵⁴; *Mollison*, 22d Feb. 1822, 1 S. 346; *Burrell*, 15th May, 1828, 6 S. 801; *Christison*, 11th July, 1838, 16 S. 1381. See also *Booth*, 8th Dec. 1835, 14 S. 113. But see *Hume*, 26th Nov. 1834, 13 S. 90.

¹ *Mitchelsons*, 15th Nov. 1820, F.

² *Patons*, 16th May, 1797, M. 11376.

³ *Earl of Traquair*, 26th June, 1822, 1 S. 527.

⁴ *Howden*, 8th July, 1815, F. As to the interpretation of intention, as regards the revocation of provisions under trusts, see *Monteath*, 11th Dec. 1776, M. Presumption, App. 2; *Lindsay*, 6th Feb. 1827, 5 S. 297; *M'Intyre*, 1st March, 1821, F.; *Smith, &c.* 10th June, 1829, 7 S. 734. See also *Drummond*, 17th July, 1782, M. 11373; and *Allan*, 28th Jan. 1842, 4 D. 494. A very special case.

⁵ 1 Sug. on Pow. 428, 6th ed.

⁶ 1 Ves. 61.

Conveyance
for a party
not an heir.

Deletion of
name.

Question
where deed
of revocation
is burnt.

So far re-
served power
liberally in-
terpreted.

Rule in law
of England.

limited a term to trustees, with power to charge L.1000. The settler made his will, and charged all his real and personal estate with his debts and legacies. Lord Hardwicke held, that the power was executed, as it was to be construed liberally. And as to the execution of it, the donee had used the word charge, which was the word in the power, and it was only a shadow of a difference that he had charged all his estate; whereas this was before settled to uses, for these powers to the owner were to be considered as part of the property.

Effect of deed
in general
terms in law
of Scotland. With regard to the effect of a deed in general terms, as to the execution of a reserved power, by the law of Scotland, it would seem to stand thus:— If the conveyance were to trustees for purposes to be declared by a future deed, a disposition in general terms, without referring to the reserved power, would be held as an exercise of that power. If for behoof of a certain class, with a power to alter or burden, then, as the declared interest is in existence, and only subject to the reserved power, the exercise of that power, and consequent alteration or revocation of the declared interest, will not be presumed from a deed in general terms. For although, in strictness, the trustor is held as not to have been divested of the right of property, in consequence of the right of alteration or revocation reserved, yet failing its exercise, the declared right is vested in the trustee, and therefore can only be affected by positive declaration of intention.

Effect of law
of death-bed.
Right of
heir-at-law. The effect of the law of death-bed on the subsequent declaration, or alteration of purposes in trust-deeds of settlement, is, that the heir-at-law has a personal privilege, in virtue of which his predecessor

cannot effectually, on death-bed, disappoint his right, by conveying the heritable property to a stranger. To enable a testator to disappoint his heir-at-law, he must execute, while *in liege poustie*, a deed, conveying the heritage to a beneficiary, named or specially described ; but he may limit the conveyance in favour of that beneficiary in various ways. Thus, a testator may execute a deed conveying his heritage to trustees, for behoof of a certain beneficiary, but declaring that the testator shall have power at any time, and even on death-bed, to execute a deed instructing the trustees to convey the property to the party favoured in such death-bed deed ; but declaring that, failing the execution of such death-bed deed, the property shall be conveyed to the beneficiary originally named. This was the case of Lady Essex Kerr. It is not enough that a testator, executing a trust-deed, reserves power to alter the beneficiary or the purpose on death-bed. If, in reliance on such a reserved power, the testator execute on death-bed any deed recalling the interest of the original beneficiary, and directing the trustees to convey the property to a different party, or for other purposes, the privilege of the heir-at-law would be thereby let in. He would reprobate the revocation of the grant in favour of the original beneficiary, and successfully challenge the grant in favour of the new beneficiary, as a deed executed to his prejudice on death-bed. The reason is, that in such a case, care has not been taken, in the original deed, made *in liege poustie*, to name a beneficiary who is to take the estate, failing the execution of any death-bed deed.¹ It is scarcely necessary to

¹ Ker, 10th March, 1830, 8 S. 694, Aff. 5 W. S. 718; Duke of Roxburgh,

add, that were a testator to convey his heritage to trustees, for behoof of such person or purposes as the testator should appoint by any deed executed on death-bed, a deed so executed actually on death-bed, would have no force or effect against the heir-at-law, who would be entitled effectually to claim his inheritance, as not alienated by a deed executed *in liege poustie*.¹

Death of
heir-at-law in
minority
without chal-
lenging.

Where a trust-disposition has been executed on death-bed, and the heir has died in minority without challenging, reduction is competent at the instance of the next heir, as homologation cannot be inferred against a minor, even where acting with consent of his tutors and curators; and as, if the immediate heir ratify the deed, the remoter is not entitled to challenge it.²

SECTION II. — ACCESSORY TRUSTS, BY REGULAR TRUST-DEEDS, AND OTHERWISE.

Are powers
affecting be-
neficiary
interests.

THIS class comprehends a variety of trusts, by which there is given, not a proprietary investiture and general power of management, which is usually combined with special powers, or directions to do certain acts, as in trusts, according to the proper sense of the term in Scotland, the constitution of which has now been considered; but a special power of performing a certain act, or certain acts, which may affect the interests of individuals concerned.

25th May, 1820, 2 Bligh, 619; Coutts, 17th Nov. 1795; Rev. on Ap. 14th March, 1806, M. 14958-62; Moir, 2 Mar. 1820, F. Aff. 2 S. Ac. 9; Batley, 2 Feb. 1815, F.; Clyne, 12th May, 1837, 15 S. 911, Aff. 1. M. and R. 72.

¹ Duke of Roxburgh, *ut sup.*

² Irvine, 3d June, 1808, M. Death-bed, App. No. 6.

As trusts of this nature, may be classed commissioners, who are parties whom a proprietor going abroad, or otherwise, authorizes to manage his estate, pay debts, renew titles to vassals, transact some special business for him, &c.¹ — trustees under marriage-contracts² — where trust is used as a tentative title, in which an heir grants a trust-bond ostensibly for a sum of money, upon which the creditor charges the heir to enter, and then adjudges the estate meant to be claimed ; and thereafter reconveys the adjudication to the heir, the nominal debt being thus extinguished, *confusione*, and a title vested in the heir³ — trusts for the creation of entails, whereby a party conveys his property, *mortis causa*, to trustees, for the purpose of paying debts, legacies, &c., and to entail the residue on certain individuals named, and their heirs and successors, which is a course very generally adopted in practice, as it affords parties the means of creating entails, who would otherwise find it difficult or impossible to do so, from the existence of burdens, or otherwise ; and the trust-right is in the nature of a burden on that of the heirs of entail.⁴

In trusts of this class are comprehended commissioners. Trustees in marriage-contracts. In trust adjudications.

Creation of entails.

⁴ Powers affecting rights of individuals.

¹ See Montgomerie, 12th Feb. 1823, 2 S. 207 ; Stewart, 27th May, 1834, 12 S. 636 ; Tait, 22d Jan. 1778, M. 9938 ; Presbytery of Strathbogie, 2d Aug. 1776, M. 9972, Do. *ecce* Patronage, App. No. 2.

² This class is treated of under the head of Purposes, *infra*, part 3. c. 5.

³ See Sandford on Herit. Suc. vol. 2. p. 17 ; Beveridge, 10th July, 1793, M. 5296 ; Sinclair, 4th July, 1781, M. 6725 ; Geddes, 25th Feb. 1796, M. 12641 ; Hepburn, 25th July, 1781, M. 14487 ; Noble, 12th July, 1758, M. 15606 ; Maclauchlan, 27th Jan. 1768, M. 15421 ; Craigie, 19th Jan. 1808, F. ; Dunlop, 4th July, 1820, F. ; Bellenden, 6th June, 1823, 2 S. 369 ; Rutherford, 12th Nov. 1830, 9 S. 3 ; Do. 27th Nov. 1832, 11 S. 123.

⁴ For instances of such, see Stirling, 15th Dec. 1801, M. 15455 ; Smollet's Creditors, 14th May, 1807, M. *ecce* Tailzie, App. No. 12 ; Turner, 17th Nov. 1807, M. Tailzie, App. No. 16 ; Earl of Stair, 12th Feb. 1823, 2 S. 205, Af. 1 W. S. 72 ; Do. 21st Feb. 1826, 4 S. 483, 2 W. S. 414, and 1st March, 1827, 5 S.

But trusts of this class consist most properly of powers of burdening and consenting. Thus, a power in favour of one person to burden an estate, may be annexed by the proprietor to a disposition and infestment in favour of another.¹ So also a power may be given of dividing and apportioning legacies among a class, as the children of a certain person, or among certain individuals named. And a power may be given to a party to do a certain act, with the consent of certain other persons²—as a power to a beneficiary of substituting trustees in a specified event, with the consent of certain trustees.³ But such a power will not affect a third party, as a creditor, the trust being latent as regards the public.⁴ Of this nature are also cases of latent trust, which frequently occurs in partnership.⁵ But as it is part of the policy of the British navigation laws to prevent the existence of latent trusts in regard to shipping, this is accomplished by the registry acts, 6 Geo. IV. c. 109 and 110, which

476, 2 W. S. 614; Wellwood, 12th Nov. 2 S. 475; Fletcher, 4th July, 1826, 4 S. 788; Fraser, 29th May, 1827, 5 S. 722; Trustees of Sprot, 22d May, 1828, 6 S. 833; Forsyth's, 14th June, 1832, 10 S. 646; Cuming's Trustees, 10th July, 1832, 10 S. 804; Hood, 4th Dec. 1832, 11 S. 172; Wilson, 11th July, 1833, 11 S. 995; Campbell's Trustees, 17th May, 1836, 14 S. 770; Dalrymple, 23d Dec. 1836, 15 S. 806; Ross, 9th March, 1837, 15 S. 780; Stewart, 16th June, 1837, 15 S. 1153; Stirling, 30th Nov. 1838, 1 D. 130; Trotter, 26th Nov. 1839, 2 D. 140; Adam, 18th June, 1840, 2 D. 1162; Lumden, 26th Nov. 1840, 3 D. 136; Duthie, 25th Feb. 1841, 3 D. 616; Macpherson, 16th June, 1841, 3 D. 1242; Macalister, 9th March, 1842, 4 D. 890; Gillespie, 28th May, 1842, 4 D. 1305.

¹ See Anderson, 24th Dec. 1784, M. 4128.

² See Dallas, 26th July, 1715, M. 10447; Herries, 2d June, 1829, 7 S. 695.

³ Baillie, 11 Mar. 1835, 13 S. 681; and p. 2. c. 4. *inf.*

⁴ Maxwell, 24th Mar. 1630, M. 10184; Duke of Hamilton's Creditors, 24th Nov. 1747, M. 16201.

⁵ Dingwall, 6th June, 1822, F.; Gordon, 6th Feb. 1824, F.; Redfearn, 26th May, 1813, 1 Dow. 50; Burns, 7th July, 1840, 2 D. 1348; Hume, 17th Nov. 1836, 15 S. 30.

Do not affect
third parties.

Latent trusts.

Effect of
navigation
laws.

require the publication of the name of every owner or part owner of a British vessel, and fix the rights and obligations of registered owners.¹

Such cases as these are special trusts, or confidences, and are quite distinct from ordinary business-trusts, where the performance of an ordinary act or matter of business is intrusted to a party, confidence being placed in his peculiar fitness for its performance, from professional or other knowledge, but where no special discretion is required or expected. Such accessory trusts do not require any particular form or style for their constitution; but much attention is necessary in regard to the mode in which they are expressed, from the important consequences attending them, the amount of interest at stake, and the numerous and often unforeseen difficulties attending their practical interpretation and application. Thus it is necessary to observe the general nature of the power given as regards its amount; whether, where it stands alone as a mode of disposal of certain property, it affords the means of doing so fully? whether, where it is combined with other modes of disposing of the trust-estate, it is consistent with these, and what will be the result attending its exercise or non-exercise? for the insertion of such special powers are apt to be taken alone, and not viewed in connection with the other provisions for the disposal of the trust, and so give rise to a conflict between legal claims, and such as are constituted by the special act or acts of the truster. Such questions, therefore, fall to be considered in regard to their

Which are
special trusts
of a distinct
class.

Forms, and
conditions of
their constitu-
tion.

¹ See Lumsden, 16th Dec. 1823, 2 S. 585; Tod, 5th March, 1825, 3 S. 622; Scott, 25th Nov. 1828, 7 S. 56; Do. 16th Nov. 1832, 11 S. 21; and Bell's Com. 1152, *et seq.*

34 CONSTITUTION OF PROPRIETORY TRUSTS.

individual nature, and as questions of interpretation rather than of constitution.

SECTION III. — TRUSTS BY OPERATION OF LAW.

TRUSTS by operation of law, consist of the rights of heirs and others emerging during the conducting of the trust-affairs failing the proper declared purposes of the trust, and therefore fall to be considered under the head of purposes of trusts, and rights of individuals, as affected by them.¹

¹ See part 3, cap. 2, sect. 4.

CHAPTER IV.

CONSTITUTION OF TRUSTS FOR CREDITORS, AND EFFECT OF THE BANKRUPT AND SEQUESTRATION STATUTES.

IN trusts for behoof of creditors, that is, where Proper form,
trust in
process. the trustor's affairs are so situated, that insolvency is known or suspected, the usual styles of disposition and assignation to the trustee are to be adopted; the form of conveyance by absolute disposition and back bond being, for the reasons already stated, inapplicable to such trusts; and as the back bond could in no way benefit them, seeing it could not secure them against the insolvency of the trustee.

But in order to render such trust-deeds as are Restrictions
to be ob-
served. commonly in use effectual and binding on all having interest, so as to exclude the diligence of particular creditors, certain restrictions are to be observed: as, (1.) That the creditors shall consent to the trust-deed by a deed of accession;¹ or, (2.) That Consent of
creditors. in terms of the acts 1621, 1696, c. 5, and 54 Geo. III. c. 137, sixty days shall have elapsed from the registration of infection in heritage, and intimation of assignment of personal rights and possession of moveables,² and that the deed shall be a disposi-

¹ See Campbell, 22d Nov. 1822, 2 S. 33.

² Much difference of opinion existed for a length of time in regard to the question, whether the statute 1696 applied to trusts, and a number of con-

Not within
sixty days of
notour bank-
ruptcy.

A disposition omnium bonorum. **Conditions.** *tion omnium bonorum*, and shall contain no such conditions or limitations as shall in any way interfere with the beneficial interests of the creditors. This last is a circumstance of the highest importance ; for as the creditors possess the right of doing diligence for the recovery of their debts, by attaching the debtor's estate, a mere right or power incident to the position of the debtor, of providing for the superintendence and disposal of his estate among his creditors, can never be construed or converted into a power of interfering with, or in any way limiting, such constituted rights, which cannot be affected by any gratuitous grants by a debtor.

Powers of trustee. All conditions relating to the powers of the trustee, as of limiting the time for giving in claims to a period anterior to the general division of the fund, or discharge of the debtor, or otherwise, are, therefore, wholly incompetent, unless with the consent of the creditors.¹ But as the act 1696 does not apply to corporations, personal diligence being inapplicable to such, a condition necessary for the existence of

flicting decisions were pronounced. See Smart, 9th Jan. 1696, M. 1197, by which it was held, previous to the date of the statute, that a notour bankrupt could not make a trust for creditors. Opinions of court subsequent to statute, see Sutherland, 3d July, 1724, M. 1199 ; Watson, 17th Nov. 1725, M. 1201 ; Eyemouth, 6th Jan. 1738, Elch. *vce* Bank. No. 12 ; Bell, Jan. 1727, M. 1203 ; Snee, 12th July, 1734, M. 1206 ; Aberdeen, 3d Feb. 1736, M. 1208 ; Sym, 16th Nov. 1757, M. 1212 ; Leith, 25th July, 1759, M. 1212 ; Wilson, 18th Feb. 1762, M. 1214 ; Herriot, 27th June, 1766, M. 12404 ; Jamieson, 16th Nov. 1763, M. 1216 ; Mudie, 14th Nov. 1764, M. 1217 ; M'Kell, 30th July, 1766, M. 894. The point settled before sequestration act, 54 Geo. III. c. 7, Peters, 27th July, 1770, M. Bank. Ap. 1 ; confirmed by Johnson, 18th Dec. 1770, M. Bank. Ap. 5 ; Monroe, 5, B. Sup. 385. Subsequent to sequestration act, by Hutchinson, 8th Dec. 1791, M. 1221 ; Whyte, 21st Dec. 1803. But it was held in the case of a sale by a trustee, that a voluntary disposition for a price paid, and not for anterior debts, does not fall under either of the acts 1621 or 1696. Burgh of Tinmouth, 1st Jan. 1717, M. 1128.

¹ M'Kell, 30th July, 1766, M. 894 ; Sutherland, 3d July, 1724, M. 1199.

the corporation, if introduced into a trust-deed by it, will not invalidate the deed.¹

The usual provisions of the deed, apart from any clauses agreement or accession on the part of the creditors, are, therefore, simply for the sale of the estate, division among the creditors, and restitution of the reversion to the trustee (insolvent) or his heirs.²

(3.) But, although a trust-deed may be beyond the reach of the acts 1621 and 1696, it may still be superseded at the instance of non-acceding creditors, by the sequestration statutes, 54 Geo. III. c. 37, and 2 and 3 Victoria, c. 41, if the debtor shall be a merchant or manufacturer, or other trader within the terms of these statutes, and rendered notour

Effects of
bankrupt,
and seque-
stration
statutes.

¹ Grant, 5th Jan. 1747, M. 1210.

² The most proper clauses to be introduced into such deeds, which are of a less arbitrary nature than those for the ordinary administration of family affairs, would seem to be, — the enumeration of debts; a general conveyance to the trustee; enumeration of landed estates; restrictions of conveyance, (as in the case of an entail;) general conveyance of other property, debts, arrears of rent, household furniture, &c.; declaration of trust; trustee empowered to take possession of trust-subjects, prosecute actions, remove tenants, grant leases, allow abatements from rents, and enter vassals; general powers for beneficial management; to sell and realize whole other estate and effects, also growing woods on estates; effect insurances on the insolvent's life, (if judged proper by creditors;) borrow money for purposes of trust; prosecute and defend actions; compound or refer all questions with creditors, or affecting the trust; binding trustee to assume creditors into benefit of trust; trust not to create preferences among creditors, or affect existing rights and preferences; mention of debts not to import their true amount; creditors not precluded from proceeding against co-obligants; trust-funds to be applied in payment of charges of executing the trust, payment in security of debts, due by the trustee at the date of the trust, and interest due, and to fall due thereon, including such annual allowance to the trustee as the creditors may authorize; upon fulfilment of purposes of trust, trustee to reconvey, &c.; creditors to depose to the verity of their debts, if required, and upon payment, to assign same and securities; dividends of creditors neglecting or refusing to take payment, to be consigned in bank; power to appoint factors, &c.; trustee not liable for diligence or omissions; provision for upholding trust, notwithstanding death or resignation of trustee named; succeeding trustees to call their predecessors to account; obligation to infest, and grant all additional deeds necessary; clause of warrandice; assignation of rents, titles, &c.; and warrant of assine.

bankrupt. It may, however, be a question whether the provisions of the recent statute as to a debtor dying, would be held applicable to the case of such death occurring after a trust has been regularly constituted, and the administration is proceeding in the ordinary manner, without any competent objection.

*Adjudication,
and ranking
and sale.*

(4.) In the case of debtors generally, whether traders or otherwise, where there are non-acceding creditors, although not reducible, such trusts may be superseded by adjudication, and ranking and sale,¹ or by interference of the court on cause shewn.²

*Begun dil-
gence.*

(5.) By the statute 1621, c. 18, establishing the right of real or personal creditors, to complete without interruption diligence begun for the recovery of lawful debts, any creditor who has begun to do such diligence before the date of a voluntary deed of trust, is entitled to proceed with it, this act having been held to apply to voluntary trust-deeds;³ the effect of which is, either to give such a creditor a preference, or oblige the other creditors to adopt similar measures, or discharge that particular debt for recovery of which the diligence has been used. For a trust-deed is not valid and effectual against an arrestment previously executed; nor is it effectual against a subsequent arrestment, where the arrestment is executed previous to the intimation by the trustee of the assignment in his favour.

¹ See Magistrates of Edin. 27th Feb. 1835, 13 S. 571 ; Cruttenden, 2d Dec. 1824, 3 S. 347 ; Bank of Scotland, 13th Feb. 1829, 7 S. 412 ; Cheyne, 19th Jan. 1831, 9 S. 302.

² Lockie, 14th Feb. 1837, 15 S. 547.

³ Farquharson, July, 1729, M. 1205 ; overruled by Snee, 12th July, 1734, M. 1206 ; Earl of Aberdeen, 3d Feb. 1736, M. 1208 ; Mansfield, 28th Jan. 1735, M. 1207 ; Wardrop, 19th Dec. 1744, M. 4860.

CHAPTER V.

ACCESSION BY CREDITORS.

WHERE creditors agree to the extrajudicial ^{General effect of accession.} management of a bankrupt estate, under a trust-deed by the debtor for their behoof, they are said to accede thereto ; the effect of which is to render the conditions of the deed binding on them, and to prevent them from taking measures for the recovery of their debts, independent of the trust, by diligence or otherwise.

The regular form of accession where the whole ^{Accession by deed.} creditors distinctly agree to the trust, is by a formal writing or deed, signed by each creditor or his mandatory ; and in the case of partnership, by an acting partner. The trust-deed and deed of accession form a mutual contract, conditional upon full concurrence, or non-execution of diligence, by all concerned, whether such shall be specially expressed or not;¹ and are effectual to the exclusion or reduction of all fraudulent or undue advantages secretly given for the obtaining of accession by a creditor.²

The deed of accession ought to consist simply of ^{Conditions of the deed.}

¹ See Watson, 5th Feb. 1724, M. 6397 ; Lyall, 11th March, 1828, 2 S. 288.

² Arrol, 29th May, 1810 ; Mack, 25th Nov. 1814, F. C.

a declaration of accession, authority and instructions to trustees, and appointment of certain of their number to be commissioners, with whom the trustee shall consult regarding the trust affairs ; upon which deed of accession no dependence ought to be placed by creditors for any condition except that of mutual concurrence ; all other conditions whatsoever, in order to be binding on parties, ought to be inserted in the relative trust-deed.¹

Accession inferred from circumstances

Special and general accession.

From what acts accession may be inferred.

Although no deed of accession is signed, accession may be inferred from circumstances ; or in other words, the deed may be homologated by creditors. But there may be a material distinction between accession to a trust-right, and disposition as granted by the bankrupt merely ; and accession to a general deed of accession, and conditions contained in it. The mere general import, or purpose of accession, implies agreement merely to the extrajudicial settlement of the bankrupt-estate of the trustee, and to the consequent obligation not to do diligence for the recovery of the individual debts, independent of the trust-right. Thus far, therefore, that is, as regards equality and prevention of preferences among the creditors, accession will be inferred, if a creditor shall so act as to induce his co-creditors and the trustee necessarily to rely on his concur-

¹ The proper clauses to be introduced into deeds of accession would seem to be, ratification of the trust, and obligation to conform thereto ; supersedure of diligence against trustee and trust-estate, providing that non-acceding creditors shall abstain from doing diligence ; submission of the claims of the creditors to the trustee as arbiter ; trustee to take oaths of creditors to the verity of their debts, and to make out schemes of division of the trust-funds ; trustee to submit questions with non-acceding creditors and others, and to sue and defend actions in relation to the trust or trust-funds ; appointment of committee of advice, with whom the trustee may consult ; and declaration of the powers conferred on that committee.

rence in the general propositions and arrangements made and entered into with regard to the estate: as, by attendance at meetings, personally or by ^{Attending meetings, &c.} mandatory, and although not expressly concurring in the measures proposed, yet without expressly dissenting therefrom;¹ by the creditor or his agent being knowingly appointed to an office connected with the conducting of the affairs of the trust;² by actual concurrence, or by being present without objecting to directions given to a trustee to prevent references;³ or by accepting an obligation from trustees to pay a debt out of the trust-estate.⁴ Thus, also, a party who attended meetings of creditors, and did other acts, both before and after the execution of a trust-deed, for the general behoof, was held barred from adopting proceedings adverse to the creditors, although he did not sign the deed of accession, and alleged that the debtor had been allowed to possess effects assigned to the trustee, and to exert the rights of the proprietor.⁵ But a party will not be held to have acceded to a trust, merely because, having a claim against the trustee, as by decree of court, he lodges a claim with the party declared trustee, and to whom creditors are directed to send such claims.⁶ And in like manner accession *qua* debtor does not imply accession *qua*

Exceptions.
Not inferred
from mere
demand of
payment from
trustee.

Accession qua
debtor, not
necessarily
qua creditor.

¹ Wilson, 18th Feb. 1762, M. 1214; Heriot, 27th June, 1766, M. 12404; Croll's Trustees, 7th May, 1791, M. 12404; Campbell, 5th July, 1791, M. 11683; Rosebery's Creditors, 14th Jan. 1737, 5 Brown's Sup. 187; Gibson, 7th Dec. 1824, 3 S. 374.

² Anderson, 2d March, 1813, F. C.

³ Lea, 16th Jan. 1828, 6 S. 350.

⁴ Earl of Breadalbane, 16th Jan. 1824, 2 S. 621.

⁵ Borthwick, 13th Nov. 1832, 11 S. 1.

⁶ Campbell, 3d July, 1829, 7 S. 826; Hamilton, 21st June, 1834, 12 S. 766.

creditor; in the former, he has only to see that he gets a proper discharge; in the latter, his own immediate interest is affected, and therefore presumed to have been brought under consideration.¹ Nor will accession be readily sustained upon mere communings with the trustee, unless upon very strong proof of actual accession.² So also, for instance, where there was no deed of accession—and at a considerable period of time subsequent to the date of the trust-deed, a first meeting of creditors had been called by the trustee to consult them in regard to the claim for composition of entry by the superior—and various subsequent meetings were called and attended for the purpose of giving instructions as to lowering the upset price of lands, and the disposal of the rents which had been received by the trustee or factor—but it did not appear that any thing was done at these meetings to preclude the parties from adopting separate measures,—it was held, that the mere circumstance of the pursuers being willing that their debtor's estate should be conveyed to a trustee for the purpose of being sold for the payment of the debts secured upon it, and to receive their payment from such sale, was not sufficient to prohibit them from adopting separate measures; and that the estates not yet being sold, fully justified these measures.³

Special accession requires explicit proof.

Where accession is to include agreement to other conditions, such as the discharge of the debtor, submission of claims, provision for the debtor, or any other burden on, or limitation of, the creditors'

¹ Mackay, 6th June, 1822, 1 S. 465.

² Larkin, 1st July, 1824, 3 S. 200.

³ Kerr's Trustees, 15th Dec. 1832, 11 S. 219.

claims, most explicit proof, by writing or otherwise, will be required.¹

Circumstances, however, may of course be such in this, as in other mutual contracts, as to preclude the possibility of resiling, matters being no longer entire, —as, by agreement, on one hand, to resign individual preferences, or other advantages, for the common behoof of all, on condition of general accession by one or all concerned, acquiesced in, expressly or tacitly, although no deed be actually signed.²

¹ Heriot, 27th June, 1766, M. 12404 ; Hamilton, 21st June, 1834, 12^oS. 766.

² See 2 Bell. Comm. 500 ; Steins. Assigs. 7th June, 1829, 7 S. 686. Rev. on Ap. 5 W. S. 47.

Where
matters not
entire, resiling
incompetent.

CHAPTER VI.

INTERNATIONAL QUESTIONS RELATIVE TO TRUSTS.

Principles applicable to.

Two principles are to be kept in view in considering this subject, in so far as regards heritable property : First, the transference of lands or tenements, or burdens created upon them ; and second, an obligation to convey such subjects. The actual conveyance is regulated by the rules of the law of Scotland, where the subjects are situated. But the validity of an obligation to convey depends upon the form adopted in the territory in which, for the time, the grantor of the obligation is resident.

Transference of lands.

Obligation to convey.

*Distinction between conveyances, *inter vivos* and *mortis causa*.*

Scottish heritage can only be conveyed according to the rules of Scottish law.

A distinction is also to be made between testamentary grants meant to take effect after death, and obligations, whether onerous or gratuitous, that are to take immediate effect. Gratuitous testamentary grants of heritage, being mere legacies not binding the grantor, have no validity unless executed in the form sanctioned by the law of Scotland for the transmission of heritable subjects, as already treated of.¹ Thus heritable property, in Scotland, cannot be conveyed by a testament executed in England, although it would there have been effectual for that purpose.² So, also, a trust-conveyance of property,

¹ See part 1, cap. 3.

² Henderson, 10th June, 1795, M. 4489.

in the Scottish form, including heritage to trustees named in a previous will, for the purposes stated in the will, or to be declared in any future will, was held not to be revoked by a second will executed in the English form, and not probative by the law of Scotland, revoking all former wills and testamentary dispositions, and containing a settlement of all the testator's property including the heritage.¹ And, in a subsequent case, it was also held, that a Scotch trust-disposition of heritage cannot be revoked by an English will not probative according to the law of Scotland.² Thus also, a Scotsman having a right, as institute under a trust-deed without irritant or resolute clauses, to certain lands in Scotland, having married in England, and, by his marriage-contract, settled the lands on the survivor of himself and his wife; it was held, that the effect of that settlement on the destination of the lands must be determined by the law of Scotland.³ And a deed executed by a party domiciled in England, disposing, according to the law of Scotland, a landed estate in Scotland, burdened with a sum of money in favour of parties then resident in England, must be construed according to the law of Scotland — such a deed being a Scottish deed, and containing a direct conveyance of Scottish heritage.⁴ Where a Scottish lady, who had right to a share of two Scottish heritable bonds, disposed to trustees, by a deed of settlement which referred to a previous English will, and declared the bonds to be conveyed

Deed must be
probative by
law of Scot-
land.

Interpreta-
tion of foreign
deeds.

English
marriage-
contract,
Scots deed
made in
England.

Antenuptial
contract in
Scots form,
by a person
who died in
England.

¹ Fordyce, 5th July, 1827, 5 S. 897.

² Cameron, 19th May, 1831, 9 S. 601 ; Aff. 29th Aug. 1833, 7 W. S. 106.

³ Weir, 6th Dec. 1821, 1 S. 192.

⁴ Blacket, 30th May, 1832, 10 S. 590.

for the same purpose as a certain moveable estate mentioned in the will, which was invested in the public funds, while the deed of settlement contemplated the investment of her share of the bonds in Scottish heritage — thereafter, by antenuptial contract in the Scottish form, with a domiciled Englishman, she conveyed the whole estate, heritable and moveable, belonging to her, or which should belong to her during the existence of the marriage, to trustees, to pay the interest to the spouses, or surviving spouse ; and thereafter, the sums to the children of the marriage ; failing whom, to her heirs and assignees — and she died domiciled in England, without leaving children, and intestate — and the bonds continued invested in Scottish heritage, and her husband was her heir *in mobilibus* by the law of England, — it was held, that although the law of England must regulate her intestate moveable succession, yet that, in so far as her succession consisted of Scottish heritage, the law of Scotland must point out the heir to whom it descended, and that, therefore, the husband had no right to a share of the Scottish heritable bonds.¹ So also, where a Scotchman, in a trust-deed of settlement executed in Scotland, had included certain property which the deed was ineffectual to convey by the law of England, as not being tested by three witnesses,—it was held, in a question as to whether the heir could take the English estate, and also claim under the trust-deed of settlement, that the matter of intention to pass the English property was to be construed according to the rules of the law of Scotland.² The

Matter of
intention in
Scots deed
interpreted
according to
law of Scotland.

Combined
English and
Scotch trust-
deed, how
interpreted.

¹ Murray, 30th June, 1836, 14 S. 1049.

² Dundas, 14th Jan. 1829, 7 S. 241 ; Aff. 22d. Dec. 1830, 4 W. S. 460.

general rule, therefore, is, that a trust-deed which ^{General rule.} is effectual to convey Scottish heritage, will be effectual wherever made, as its validity can be judged of by the law of Scotland alone.¹ A trust-disposition of heritage, of which the party dispossessing shall die possessed, and referring to trust-uses as specified in any will executed, or to be executed, in the English form, constitutes, with such will, an effectual conveyance of heritage in Scotland for the purposes set forth in the English will; and the legal effect of such a combined trust-deed must be decided by the law of Scotland, and not of England, as it regards heritage situated in Scotland.² And letters of instruction to trustees, joined to a testament executed abroad, are sufficient to constitute liferents heritably secured in this country.³ Where a deed was executed according to the Scottish form, by a proprietor of landed property in Scotland, residing abroad, conveying his property to a trustee, for the purpose of paying him the rents during his life, and, after his death, of disposing it to such persons as he should specify in his will,—it was held, that such a deed does not require delivery, and is effectual to transmit the property to the person named in the will, although the will be not tested in the Scotch form.⁴ Here, the estate being vested in the trustees, the instructions contained in the will were held binding on the trustees. Thus also, in the case of Lady Essex Ker, where a trust-disposition of lands in Scotland had been duly executed in England, according to the Scottish form, a deed of

*Letters and
deeds of
instruction
to trustees.*

¹ See Weir, 6th Dec. 1821, 1 S. 192.

² Cameron, *ut sup.*

³ Stewart, 19th May, 1791, Bell. Ca. 225.

⁴ Brack, 23d Nov. 1827, 6 S. 113; Aff. 25th Feb. 1831, 5 W. S. 61.

nomination relative to the said trust-disposition, executed according to the English form, was held to be effectual in Scotland.¹ These authorities, when taken in connection with the numerous authorities which exist in regard to questions of this nature, seem amply sufficient to establish the doctrine already stated.

Personal bonds to heirs and assignees excluding executors.

Heritable property situated abroad.

Upon the principle that a foreign testament, bequeathing Scottish heritable property, is not sustained in Scotland, a Scottish personal bond taken to heirs and assignees, but excluding executors, that is, moveable property made heritable by destination, cannot be carried by a foreign testament.² But in all questions touching heritable subjects situated abroad, the foreign testament will be enforced according to the *lex loci*. Thus the testament of a Scotsman, resident in the East Indies, is interpreted according to the law of England, which is administered there;³ and the right of Scottish spouses, in reference to property falling to one of them by decease of a foreigner, is regulated by the law of Scotland; but the character of funds situated in a foreign country, as heritable or moveable, is to be determined by the law of that country. It has accordingly been held, that bonds bearing interest in the island of Jamaica, and falling, by succession, to a married woman in Scotland, being, by the law of that island, moveable, became part of the goods in communion, to the effect, that the husband, on her death, was entitled to one-half thereof.⁴ The possession of a real estate,

¹ Ker, 24th Feb. 1829, 7 S. 454, 8 S. 694, 9 S. Apx. 15, 1 W. S. 381.

² See Ross, 4th July, 1809, F.

³ Wightman, 16th June, 1802, M. 4479.

⁴ Newlands, &c. 22d Nov. 1832, 11 S. 65.

in Scotland, creates a jurisdiction against the proprietors, though foreigners, in ordinary personal actions; and, if merely trustees, in such actions against them *qua* trustees. And arrestment *jurisdictionis fundandæ causa* is not necessary, as it is in moveables.¹

An obligation to convey heritage in trust gives only a right of action at the instance of the intended trustee, or other party interested, against the party bound to create the trust, to the effect of obtaining the decree of a court of justice, and of such means of compulsion as the law affords to enforce the decisions of judges. The deed by which the obligation is proved, must be executed in such a form as would render it obligatory in the country in which it is executed. Thus, in Scotland, the deed must be such as the law holds probative, that is to say, holograph of the grantor, or attested in the form enacted by the Scottish act 1681, cap. 5, and other previous statutes. If executed in England, France, Italy, &c. it must be executed in the form which the law of these countries respectively holds valid and binding.² On the principle, that personal property has no situs, a testamentary deed executed according to the forms adopted in the country where it is made, will convey personal estate wherever situated; but the construction of the conveyance, and the import and effect of its several provisions, must be determined by the law of the trustee's domicile.³ Thus, where a party created a trust-

Obligation to convey, gives right of action.

Personal property governed by the *lex domicilli*.

¹ Ferrie, 30th June, 1831, 9 S. 854.

² Alexander, 1st July, 1829, 7 S. 817; Dundas, 22d Dec. 1830, 4 W. S. 460.

³ Hardman, 9th July, 1842, 4 D. 1505.

settlement of his whole moveable effects, wherever situated, and the trustees nominated refused to accept, and other trustees were appointed, by authority of the court, but of consent, to carry the deed into effect—but one of the next of kin domiciled in Scotland had administered to the estate during the interval, both in England and Scotland—and a question arose as to the conveyance of the property in England, and exoneration of the party administering, and actions had been raised respectively by the parties in the Court of Chancery in England, for exoneration, and having the estate in England administered in the Court of Chancery there—and an action was brought by the trustees in the Court of Session, concluding for declarator of their right to the whole moveable estate in England and in Scotland, and decree ordaining the defender to convey the said estate to them,—it was held, that the Scottish courts were competent to decide the question, and that the trustees were in right of the whole estate of the deceased in England and elsewhere.¹ By the law of England, assignment alone is necessary to complete the transference of debts; but by a peculiarity of the law of Scotland, such conveyances require to be intimated to individual debtors, in order to complete the transference, and make it effectual. So that, although an assignation not intimated be good against the grantor, who cannot question his own deed; yet, if before intimation of an assignment, the cedent shall grant a second to a different assignee, the second, if first intimated, will be preferred.

Intimated
assignment
necessary for
conveyances.

¹ Melville, 8th Feb. 1838, 16 S. 472.

But even in regard to moveables, the rule that the law of the proprietor's domicile shall in all cases determine the validity of every transfer of property, suffers some exceptions, as in the case of the public funds, in which the local law must form the rule. This applies to stock, funds, and shares generally, in any public company, which become heritable *destinatione*, no positive transfer of which can be made except in the manner prescribed by the local regulations. But, nevertheless, the transference of such property is valid, if made according to the *lex domicilii* of the owner, or the *lex loci contractus*, unless such contracts were specially prohibited by the *lex rei sitae*, and the property would be treated as personal or as real in the course of administration according to the local law. Though the transfer of stock abroad may be affected by the local laws, it is not to be held as partaking of the character of heritable property. And if, by the local law, it be held as personal property, it may be disposed of as execrury funds, and transference of it will be valid and effectual if made in the form prescribed by the foreign law. But it must always be kept in view, with regard to this branch of the subject, that, in questions of succession of moveables or personal estate, the law of the owner's domicile forms the rule of his succession.

In the case of mortifications, legacies to trustees by persons residing in England, of money to be laid out in land or heritable securities in Scotland, for charitable purposes in Scotland, do not fall within the mortmain act, which prohibits the giving of heritable or moveable property for charitable purposes unless under certain restrictions, and which is

Mortifications; mortmain acts; bequests by persons in England of money to be laid out in land in Scotland.

declared not to extend to Scotland.¹ Being directed against the increasing land estates and consequent power of the church, it prevents heritable property from being, by disposition or purchase, placed *extra commercium* by dying persons, and is therefore not framed for the purpose merely of preventing such bequests by dying persons; and as Scotland is expressly exempted from its application, it does not restrict bequests to take effect there. This act is therefore not, as has sometimes been supposed, in its policy equivalent to the law of deathbed in Scotland, which, so far as relates to the conveyance of heritage, is of general application, and directed against persons so situated; and not merely against any special purpose to which it may be applied, which is the policy and intent of the English statute, although that statute, in a certain degree, produces a similar effect as regards the power of conveying by testamentary deed. But where a Scotchman, by will in the English form made in England, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in Scotland, in trust, to lay out in purchasing lands or rents of inheritance in fee-simple, for the purposes expressed in an instrument of the same date, and by which instrument he directed the trustees of his will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of that town,—it was held by Lord Lyndhurst, and

¹ 9 Geo. II. c. 36; Oliphant, May, 1784, 1 Br. C. C. 570; Mackintosh, 9th and 12th June, 1809, 16 Ves. 380; Williams' Law of Executors, 859.

afterwards by the House of Lords, that the bequest was void under the statute, on the ground that the question was, whether there was an option given in the instrument to the trustees to purchase heritage in Scotland; that had it appeared in distinct terms, or by clear implication, upon the face of the will, that the trustees were to lay out money in purchase of real estate in England or Scotland as they might think fit, there would have been no objection to the bequest; for unless there were something leading safely to the conclusion, that the testator intended to give them authority to lay out the money in the purchase of real property in Scotland, it would come within the ordinary case of a direction by a testator to his trustees, or executors, to lay out money in the purchase of real property generally, to be applied to charitable purposes, which, whether the charitable objects be in England or Scotland, would be a void bequest.¹ It has also been decided in Scotland, that the mortmain act does not extend to settlements made in Scotland with regard to money invested in the British funds.²

Bequest
made in
England in
general term s
for a charita-
ble purpose in
Scotland.

Mortmain act
does not apply
to public
funds.

¹ Attorney-General v. Mill, 14th and 16th May, 1827; 3 Russ. Chan. Ca. 328, 1831; 5 Bligh, N. C. 593, 5th March, 1830, and 14th October, 1831, 2 Dow, 393. See observations on this statute in Bank. b. 2, t. 3, a. 58.

² Macra's, 1st Feb. 1786, M. 15948.

CHAPTER VII.

OF PROOF, AS REGARDS THE CONSTITUTION OF TRUSTS GENERALLY.

As the subject of proof, as regards the constitution of trust, is so intimately combined as one general subject, it seems proper and necessary here to treat of it, both as regards formal trusts by deed, and as regards trusts in the general sense of the term.

Common law rule.

Erroneous practice in seventeenth century.

It is a principle of the common law of Scotland, that an heritable right of property, constituted by charter and seisin, or disposition and seisin, cannot be overturned or controlled, restricted or modified, by parole proof. But during the seventeenth century, an erroneous practice was introduced, by which the courts of law allowed the title of a proprietor to be converted into a mere trust for behoof of a third party, on the authority of a proof by witnesses. This gave rise to much litigation, and probably to great injustice. It became at length obvious, that this new practice was erroneous, and ought to be departed from. For that purpose, a statute was enacted, which not only restored the rule of the common law in regard to the evidence by which heritable rights could be affected, but also extended the rule to many other cases ; this was the

statute 1696, c. 25, which enacts, "that no action <sup>Act 1696,
cap. 25.</sup> of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of party *simpliciter*: declaring that this act shall not extend to the indorsation of bills of exchange, or notes of any trading company."

This act applies to all trust conveyances of <sup>Applies to
heritage and
moveables
alike.</sup> heritage, and heritable rights, and rights of a personal nature, but not to trusts of such moveables as are usually acquired and transferred by verbal bargains, the import of which may be proved by witnesses.¹

Wherever a party is trusted in such a form as to become *ex facie* proprietor of the subject, in virtue of the confidence of the trustor, a proper trust is constituted; and third parties, acting *bona fide* with such trustee, are safe to become purchasers of the subject of the trust. On the other hand, when an individual is employed merely to act as administrator or manager for behoof of another, trust is, in common language, said to be reposed in the parties so employed. But it is legally a subordinate trust, the existence of which may be proved *prout de jure*, and in regard to which, the party employed is a mandatory, bound and entitled to act *intra fines mandati*. Thus, one party having, at a public sale, <sup>Allegation of
trust by
trustee.</sup> purchased a house for another by verbal order, a

¹ Lord Strathnaver, Dec. 1731, Mor. 12757.

proof was allowed by witnesses of facts, tending to shew that the order had been given.¹

By trustee.

Attempt to
restrict appli-
cation of
statute.

If, on the other hand, the employer had desired to have the house, which in the case now mentioned had been purchased, and demanded a transference to him of the bargain, and if the person who purchased had denied that any employment to make the purchase had been given and accepted by him, the alleged employer pursuing a declaration of trust, could only have proved the trust by the writ or the oath of the person said to have been employed. The Court, at an early period, probably from motives of equity, appear to have attempted to restrict the effect of the statute to cases of regular title in favour of a party, which was not to be set aside for behoof of an antagonist, without a proof by the oath or the writing that a possessor under a regular title of property was merely a trustee or nominal proprietor, holding the subject on behalf of the claimant. But in cases in which it was alleged that formal deeds had not been framed, but that one party had employed another to purchase property for his behoof at a sale, and that the employment had been accepted, the Court seems to have held, that it was improper to apply to such cases the strict rule of the statute; that is to say, it attempted to distinguish between trust given and accepted in relation to business transactions, and trust by which titles of property were to be so far annulled, as to stand effectual, on behalf, not of the *ex facie* owner, but of another alleged to be his constituent or trustee.

¹ Mudie, 13th June, 1766, Mor. 12403.

Thus, where A, a law agent, purchased, at a judicial sale, certain lands, which B alleged that he had given a mandate to A to purchase for him, and that A had accepted of the mandate, and therefore ought to denude in his, B's, favour—A having denied the trust, and objected on the act 1696, that it was not competent to rear up his mandate or trust by witnesses,—the Court allowed a proof *before answer*;¹ and upon advising the proof, assailed B upon the insufficiency of the proof.² And also where A gave a commission to B to purchase for him certain lands at a sale, which B did, and entered into a minute of sale in her own name, and C, an assignee of A, having brought an action against her to denude, she denied the trust; a proof was allowed, by which the trust having been proved, the heirs of B, who had died during the dependence, were decerned to denude, and found liable in expenses.³ But subsequently, the law on this subject having become more matured, a different view was adopted.

Thus, where it was alleged that a party had given authority to another to purchase a certain subject for him, and had given money to pay for it, no direct trust by disposition having been given, but simply a mandate—the question as to the existence of a trust having arisen between the party alleging the trust, and the heir of the alleged trustee,—it was held incompetent, in terms of the act 1696, cap. 25, to prove this by witnesses, but by writ

Subsequent rule.

¹ This is a mode of expiating the facts of a case, frequently adopted by the Court, though not perhaps in cases of trust such as this.

² Tweedie, 5 Br. Sup. 630.

³ Maxwell, Do. The case of Stewart, 8th July, 1777, as reported in 5 Br. Sup. 631, is too indefinite to be of authority, and moreover there appears to have been written evidence in it.

or oath only.¹ The law as to this subject is very fully stated in the well-known case of *Duggan v. Wright*,² affirmed on appeal,³ in which parole evidence was refused, although it was alleged that the trust was in part established by circumstances of real evidence. This case was founded on in a more recent case, where A, after purchasing an heritable subject in his own name at a public sale, having subscribed a letter along with B to the seller's law agent, stating, that the purchase had been made for behoof of B, and authorizing a disposition to be prepared in B's name, of which letter B kept possession, although he shewed it to the agent—and A having subsequently paid the price, got a disposition in his own name, on which infestment followed, and possessed the subject for several years without opposition,—it was held, that A could not be required to denude in favour of B, there being no writ of A, shewing that he took the disposition in trust for B, although it was alleged, that his doing so was a fraud which might be proved *prout de jure*, and that, therefore, the circumstances were not sufficient to elide the necessity of referring to the oath of the defender.⁴ There is a distinction between the case, where the allegation is, that a mandate to purchase was given, and where the

¹ Alison, 31st July, 1771, Mor. 12760. This case is differently reported in 5 Br. Sup. 630, but less fully, and apparently incorrectly. It is stated in this case, as reported in M., that it was observed upon the bench, that the previous cases of Maxwell and others were not properly questions of trust, but challenges immediately brought of transactions as fraudulent, whilst here it was a direct trust. But there appear to be no good grounds for such a distinction.

² 2d March, 1797, Mor. 12761.

³ 24th November, 1797, Mor. 12767.

⁴ Mackay, 4th June, 1829, F. Coll. vol. iv. 8vo. 967, 7 S. 699.

allegation or fact is, that the alleged trustee offered to convey the property,—in the former, there must be proof of acceptance of the mandate on the part of the trustee; in the latter, proof of offer on the part of the trustee, and acceptance on the part of the trustee.¹ The application of the act may, of course, be superseded by judicial admission and payment on the part of the trustee.²

It has been contended in several cases, that under the words of the statute, a trust can be proved only by a declaration, or back-bond of trust, lawfully subscribed by the party alleged to be the trustee. But this strict interpretation of the words of the statute has been rejected, *ex aequitate*. This, therefore, is the true import, in this respect, of the case of Duggan, as appears from the case of Macfarlane *v.* Fisher,³ in which it was held, that it is competent to prove trust by probative writings under the hand of the party, importing an acknowledgment or admission of trust, although not a formal back-bond of trust. And moreover, it is not necessary even that the trust shall be expressly declared or stated in such writings; it is sufficient if their tenor is such as to infer a trust.⁴ But it will not be sufficient that a writing importing a trust shall be holograph; for in order to make it probative, it must also be signed.⁵ It has, however,

Formal declaration not necessary.

Express declaration of trust not necessary. May be inferred.

Although holograph, must be signed.

¹ McMillan, 28th Nov. 1824, 3 S. 308.

² Adamson, 29th Jan. 1834, 12 S. 359.

³ 23d May, 1837, 15 S. 978. See also Lyon, 25th May, 1830, 8 S. 789; Aff. 16th July, 1832, 6 W. S. 114; and Robertson, 14th Jan. 1830, 2 D. 279; Drummond, &c. 17th Dec. 1766, M. 12746; Baillie, 7th June, 1821, 1 S. 49; Manship's Executors, 8th June, 1821, 1 S. 59; Stirling, &c. 5th July, 1822, 1 S. 545.

⁴ Ramsay, 30th July, 1748, M. 12757.

⁵ Watson, 9th Dec. 1708, M. 12755.

Decided, that
trust may be
proved by a
writing
signed, but
not otherwise
probative.

Of very doubtful authority.

been decided in the case of *Taylor v. Crawford*,¹ that it is not necessary in a declarator of trust, to produce a probative writ by the trustee admitting the trust; but that a genuine subscription to an acknowledgment of trust is sufficient to constitute the subscriber a trustee. This decision is one of very serious importance; for if it is to be considered as fixing the law on the point referred to, its effect in relation to trusts, is to dispense with the rule laid down by the statute 1579, c. 80, that deeds of great importance, that is to say, as construed in practice, relating to matters above the value of a hundred pounds Scots, must be executed with certain solemnities, and which solemnities are more minutely stated in the act 1681, c. 5. Under the decision now mentioned, a mere subscription not held probative by the statute law and general practice of Scotland, might convert a charter and seisin of a land estate in favour of A into a charter and seisin held only nominally by A, and truly for behoof of B. Notwithstanding the terms of this decision, upon looking to its effects as regards the tenures of property, it does not appear that it can be held as finally settling this point. It does not, indeed, appear from the terms of the report, that the question was put upon the true grounds to test its merits. The effect of the statutes now alluded to does not appear to have been taken into consideration; nor does the only principle upon which such rights can be qualified, otherwise than by probative writings or oath of party, that of homologation, appear to have been properly discussed, or

¹ 14th November, 1833, 12 S. 39.

its important bearing on the question at issue attended to. The effect of homologation, when proved, is, to give a document to which the signature merely of a party has been exhibited, the effect of a probative document that is holograph of the party, or duly tested. If, therefore, in such a case as that of Taylor, a document shall be produced simply signed by the party, it would be perfectly competent to prove by parole testimony, that the party had, by his subsequent conduct, virtually homologated the obligation contained in the writing, as by applying the proceeds of the estate directly or indirectly for behoof of the party for whose behoof the said written obligation or acknowledgment had been granted ; but without such proof of homologation, it would undoubtedly appear, that it may with deference, but at the same time with confidence, be stated, that a legally constituted right of property would not be held as qualified by a document such as that now alluded to. In none of the cases there referred to, has such a doctrine been held ; for in all of those, other miniciles of evidence have been produced, clearly shewing that the party had acted in the capacity of trustee, or, at all events, admitted that his right was so qualified.¹ In the case of Macfarlane *v.* Fisher,² an opinion was intimated, that in a declarator of trust, it is not necessary to prove the constitution of a trust *ab initio*, but that proof of an emerging trust will support a conclusion for declarator of trust; and of this there seems to be no reason to doubt, as, in effect, every trust by absolute

Emerging
trust.

¹ The pleadings and judgment in the case of Watson, *et svp.* seem also to imply that a strictly probative writ is necessary.

² *Ut svp.*

disposition and back-bond is, in form at least, an emerging trust—not the period of time, but the actual fact and manner of proof, being the important element. It is, as already stated, a decided point, that a formal back-bond of trust is not necessary to prove trust; but it does not appear how or why the rule of law as to proof of resulting or incidental trusts, should differ from that of regular trusts, the actual effect being the same.

Whether
competent for
a third party
to prove trust
prout de jure.

It has been held in the case of *Elibank v. Hamilton*¹, that it is competent for a third party alleging the existence of a trust, (on the ground of a fraudulent purpose, for instance,) to prove it *prout de jure*, on the ground that the act 1696 only applies to the case of proper declarators of trust, at the instance of the truster, or those in his right, against the trustee. But in the subsequent case of *Scott and others v. Miller and others*,² the reverse has been held. The grounds of the opinions of the majority of their Lordships appears to have been (as contained in the opinion of Lord Gillies) this:— “I do not remember any case in which a proof *prout de jure* was held competent, on general principles, to a third party seeking to prove the trust character of an *ex facie* absolute right. It is a sacred principle of the law of Scotland, that trust cannot be proved by parole, either under a declarator of trust, or otherwise. It is not alleged that such proof is competent to the truster, and it would lead to very anomalous consequences if it were open to a third party. Suppose that parole proof of the payment of the contents of a written obligation is offered by the

¹ 16th November, 1827, 6 S. 69.

² 16th November, 1832, 11 S. 21.

party who made the payment, such proof is clearly incompetent. But does it become more competent if tendered by a third party, who alleges, and perhaps truly, that he had an interest in expiscating the truth, and ought not to be limited in his mode of proof, however just such limitation may be in the case of parole proof being tendered by the party who made the payment? But would the court permit a third party, on such a plea, to adduce proof of this description? certainly not; and I do also think that a parole proof of trust is as incompetent when tendered by a third party, as when offered by the trustee himself. Were it otherwise, this court would often be obliged to declare, where the question lay between A and B, the trustee and the trustee, (in which case the proof is undoubtedly limited,) that there was no trust in B; and yet, perhaps next day, or the same day, it might have to declare, in a question between B and C, a third party, that there was a trust in B. I therefore dissent from the doctrine laid down on this subject by the chair." This view of the question concurs precisely with the principles laid down in the cases of Duggan, Alison, and Mackay, already mentioned; and moreover, in the case of Lord Elibank, the question at issue might clearly rest on other grounds.

Subordinate trusts, of which an instance has already been mentioned,¹ are of very frequent occurrence in practice, in regard to transactions generally. As, for instance, where a trustee has conveyed the trust-fund to the trustee, or to the party beneficially interested, there is no room for the

Subordinate
trusts do not
come under
the act 1006,
cap. 25.

¹ *Mudie, ut supra*, p. 56.

application of the statute. Thus, where A held a share in a company, in the name of B, who never drew any part of the proceeds and emoluments thereof himself, but B drew the whole proceeds and emoluments, and applied them for his own behoof—and B, on a certain date, assigned and conveyed the share which stood in his name, to A, which, in virtue of the trust, he was bound to do,—it was held, that the creditors of B, founding on legal diligence, could not stand in a better situation than he did, and that the act 1696, c. 25, did not apply to the circumstances of the case, so far as B's creditors were concerned.¹ Thus, also, where a creditor, being a law-agent, obtained bills to be accepted in favour of a friend, and goods to be delivered to himself in security of them, he, the creditor, was found liable to account for the goods to the extent of his intromissions, to the effect of extinguishing the bills, which the whole circumstances of the case shewed to have been taken for his behoof, although in name of his friend, the debtor not being required to prove the trust by writ or oath of party.² These cases may be sufficient to shew the distinction between regular and subordinate trusts; the general rule as to which, therefore, is, that unless in the case of subordinate trusts, that is, business mandates, trusts cannot be proved by parole proof of facts and circumstances. This is also distinctly marked by the circumstance, that at common law, as decided before the date of the statute, where it was alleged in a process, that a minute of mutual contract, which was in the hands of the writer, was lodged only till

¹ Dingwall, 6th June, 1822, 1 S. 463, F. and inf. part 2, c. 5.

² Wood, Small, and Co., 14th Nov. 1833, 12 S. D. 42.

certain things should be performed, it was held incompetent to prove this by the writer of the minute, and the witnesses to the minute.¹

Certain other cases have, by the ingenuity of pleaders, been attempted to be brought within the law of trusts, in relation to the mode of proof, but without success. Thus, where a party had been in the practice of drawing bills in favour of his servant, and one of these having been in the custody of his servant at the time of his death, it was, in the circumstances, found to be so for behoof of the master.² And where a party had conveyed to another an adjudication over certain lands, in collateral security of a debt, and thereafter named certain trustees for the management of his affairs, who paid the debt on which the conveyance had been made—and the creditor having died before he had reconveyed the adjudication to the debtor and his heirs, raised an action against the creditor's heirs to reconvey, the debt having been paid—an objection as to proof *prout de jure*, founded on the statute, was held inapplicable, as this was more properly a declarator of extinction of debt, and reduction of the adjudication.³ In one case, a letter by a brother, and another by a sister, who were executors, stating their conviction that their deceased brother had received a government pension in the character of trustee for a third party, were held sufficient to prove the trust, although the government pension had been granted directly to the deceased, without

Cases unsuccessfully attempted to be brought within the rules as to proof in trusts.

¹ Crawfurd, 29th June, 1625, Mor. 12304.

² Maclarens, 8th Feb. 1710, Mor. 12756.

³ Gilmour, 11th Dec. 1765, Mor. 12758.

mention of trust.¹ Where, in a case of copartnery a bill had been delivered to one of the partners, with a discharge to get payment, and he having got payment, and given the discharge, died before clearance as to the sum so received, and the other partners insisted for payment from the children of the deceased partner,—the plea that this was a trust, and therefore, in the circumstances of the case, only proveable by writ, was repelled, on the ground that there being a partnership regarding the subject sold, for the payment of which the bill was drawn and accepted, it did not fall under the act.² So, likewise, where a party alleged that money deposited in a bank in name of a party since deceased, had been so deposited as money belonging, not to the deceased himself, but to a company of which he was a partner, — it was held, that this was an allegation of copartnery, and not of trust ; and that the rule, that trust can be proved only by the writ or oath of the trustee, did not apply.³ But, however, it must also be observed, that in the well known case of Redfearn *v.* Ferrier, Somervail, and others,⁴ it was alleged by Somervail, the partner of Stewart, that certain glass-house shares standing in the books in Stewart's name exclusively, were held by Stewart as partnership property. The Court of Session preferred Somervail to Redfearn, to whom Stewart had assigned a part of these shares ; but the House of Lords reversed the judgment, on the ground that Redfearn had acquired the shares *bona fide*, and for

¹ Montgomery's Executors, 7th Feb. 1811, F. C.

² Jackson, 2d Dec. 1714, Mor. 16197.

³ General Assembly of the Baptist Churches, 17th June, 1841, 3 D. 1030.

⁴ 26th May, 1813, 1 Dow. 50.

full value, — thus preferring a *bona fide* onerous assignee, to a claimant under a latent equity. The Court appear, in the case of the Baptist churches, to have come back to the doctrine laid down in the case of Jackson, notwithstanding the decision in the case of Redfearn ; or the bearing of this case on the question may be supposed not to have been fully considered. It undoubtedly seems a very important decision, if it is to be held, in the imperative terms of this case, as reported, that the averment by an interested party, that funds are held for behoof of a co-partnery, takes the case out of the statute.

These decisions are properly to be regarded as resting upon the equity arising from the facts of each particular case, where such cases might possibly have been brought within the rule of law as to proof in trusts under the statute, if rigidly adhered to. They are therefore important, as in some degree pointing out the practical limits of the rule of law arising from the statute, and more particularly as shewing, that in cases of this class, the court will look to the facts of particular cases, and will, where necessary, exert the equitable power inherent in it, in discriminating as to whether the strict rule under the statute is to be rigidly enforced or not.

It has been held, that where a trust does not arise from any deed or disposition of the trustor, but from the voluntary interposition of the trustee, as *negotiorum gestor*, the statute does not apply ;¹ or as more specially stated, that the act does not apply to transactions for behoof of infants, absent parties, and those incapable of acting for themselves, or of taking

¹ Spruel, 16th July, 1741, Mor. 16201, as stated by Kilkerran.

a back-bond.¹ It does not apply, for the evident reason, that there is here, not a question of trust, but of intromission only. The truster says, I prove I am proprietor, and can prove your intromission *prout de jure*. The trustee says, I am not liable as *negotiorum gestor*, and can prove mandate by witnesses; as I do not come under the act, which only applies to the case where a trust is said to exist, in questions between the truster and trustee, or their representatives. For if trust be averred, the person averring comes under the act. So that if *negotiorum gestio* be averred, the existence of trust is denied, and in order to establish *negotiorum gestio*, property must be proved, viz. by making up feudal titles in the case of heritage, and in moveables *prout de jure*, and the alleged intromission may be proved *prout de jure*.

Remedy
where back-
bond
amissing.

The case may occur of a back-bond granted by a trustee acknowledging trust, being fraudulently abstracted and destroyed. In such a case, there can of course be no proof by writ, and the law does not put the truster to the hardship of relying on the oath of parties. The remedy is a process of proving the tenor, by which, when relative written miniciles exist, such as original drafts, &c. the back-bond may be restored by the aid of a proof by witnesses. Thus it was held, that the allegation that a document of trust had been destroyed by the granter, might be proved by witnesses, and a *semiplena probatio* was sustained.²

Effect of
fraud.

The rule, that frauds as to trust may be proved *prout de jure*, applies only where the transaction has

¹ Elchie's proof, No. 1.

² Kennoway, 18th Feb. 1752, Mor. 12438.

been brought about by means of it, or where the deed has been destroyed by it. For if a charge of fraud were sufficient to render parole proof competent, the statute would be entirely defeated, as the denial of trust always implies fraud.

The spontaneous declaration of a party on death-bed, that he holds heritage in trust for behoof of a third party, will not affect the right of the declarant's heir, without farther proof.¹

In regard to the proof of trust by the oath of a party required to produce upon oath all writings in which the pursuer has an interest, such oath cannot render a bond in favour of the pursuer conditional, by alleging, that when deposited, power was verbally given to cancel it on certain occurrences, and thus, by allegation of trust, to defeat the effect of the bond.² In an old case, it was held competent to prove the existence of a trust by reference to the oath of the alleged trustee's daughter, it being libelled, that the trust was consistent with her knowledge.³

Bankruptcy necessarily affects the proof of trust. Thus, an individual cannot recover property by referring to the oath of a bankrupt, that he holds a subject in trust for behoof of that individual, to the effect of injuring the interest of his creditors.⁴

It is a general rule, that no party is bound to act upon the supposition that a trust exists, but only upon its existence being proved.⁵

¹ Paton, 20th Dec. 1671, M. 12586 ; Crawfurd, 22d Nov. 1687, M. 12591.

² Forbes, 2d July, 1712, M. 13236.

³ Dunbar, 5th Jan. 1665, M. 9409. So, also, in a reduction of a bill on the act of the 9th of Queen Anne, it was held competent to prove by the oath of the trustee of the winner, that the same was granted for money lost at gaming, even against onerous assignees. Pringle, 7th Nov. 1740, M. 9509.

⁴ Mein, 11th July, 1829, 7 S. 902.

⁵ Campbell, 23d May, 1826, 2 W. S. 334.

Spontaneous
declaration of
trust on
death-bed.

Oath of a
heir.

Oath of an
alleged
trustee.

Oath of a
bankrupt.

Trust, to be
effectual, must
be actually
proved.

CHAPTER VIII.

DISCLAIMING OF THE OFFICE BY A PARTY NOMINATED TRUSTEE, AND ACCEPTANCE OF THE TRUST, AND VESTING OF THE ESTATE IN THE TRUSTEE.

*Acceptance,
actual or
presumed.*

IN order to complete the constitution of a trust, it is necessary that the parties appointed shall have expressly declared their acceptance of the office ; or that they shall have done some act which the law holds as inferring trust ; without which the property will not be held as vested in the trustees, nor will any liability be incurred by them.

*Proof of non-
acceptance.*

As a trustee is not vested with the office or trust-estate by mere conveyance,—but positive acceptance, accompanied (in general) by infestment being necessary in the case of heritage, and confirmation as executor in moveables,—where a party, who is nominated as trustee, does not wish to accept of the office, his non-acceptance may be declared by him in writing, or may be proved by parole.¹ But

¹ In England, a bequest to a party of a special trust, transfers to him both the office and estate. And therefore, the only proper mode of disclaiming the office is by deed, *Stacey v. Elph.* 1 M. and K. 199, per Sir J. Leach ; but not by conveyance, for that implies acceptance, *Crewe v. Dicken*, 4 Ves. 97 ; and see *Urch v. Walker*, 3 M. and C. 702 ; but see *Nicolson v. Wordsworth*, 2 Sw. 372. It may also be made by answer in chancery, *Norway v. Norway*, 2 M. and K. 278 ; overruling *Sherratt v. Bentley*, 1 R. and M. 655 ; *Bray v. West*, 9 Sim. 429 ; *Martin v. Presse*, 1 Moll. 146 ; *Parsons v. Potter*, 2 Hog. 281, and may be repudiated by evidence of conduct, *Stacey, ut sup.* ; but

if the party nominated once expressly disclaim, he
cannot thereafter assume the office.

In order to establish acceptance, it will be sufficient if a party named trustee in a trust-deed shall have allowed his name to be used in relation to the trust affairs ; or, by correspondence or other writings, have connected himself with the trust in such a manner as to lead others to infer his acceptance, and to act upon it. Thus, where a party deceased had named three trustees, and the first declined to accept, the third accepted, and assumed the management of the trust, and the second was consulted by the party specially accepting, and allowed his name to be used by him in matters respecting the trust, and corresponded with him on matters connected with the trust, and on being afterwards called upon to act, declined, — the facts and circumstances, *ex facie* of the correspondence and other documents, were held sufficient to infer acceptance of the trust.¹ So, also, where a trust-disposition was granted to L M and E B jointly, whom failing, to W B, whom failing, to certain other parties — and the precept

it would be very imprudent to allow the question whether he is a trustee or not, to remain matter of construction ; for if he fail to disclaim, he holds the legal estate, whilst the equitable or beneficial estate is vested in the cestuique trust, (beneficiary.) And by modern doctrine, he may be divested of the estate at law by deed. *Townson v. Tickell*, 3 B. and A. 36, per Lord Tenterden ; *Begbie v. Crook*, 2 Bing. N. S. 70, S. C. Scott, 128, overruling principles laid down by *Butler and Baker's case*, 3 Re. 26, a 27, a ; *Anon. case 4*, Leon. 207 ; *Shepp. Touch*, 285 ; *Bonifant v. Greenfield*, Godb. 79, per Lord Coke, and Cr. El. 80 ; and see *Shepp. Touch*, 452. But it is doubtful that this can be done by parole. See, however, *Townson v. Tickell*,² 3 B. and A. 36, citing *Bonifant v. Greenfield*, Cr. El. 80 ; and see *Doe v. Smith*, 9 D. and R. 136 ; *Bingham v. Clanmorris*, 2 Moll. 25 ; and *Creed v. Creed*, 2 Hog. 254. And parole declaration will suffice to divest the legal estate in a mere chattel interest, (moveable estate.) *Shepp. Touch* 285 ; *Butler and Baker's case*, 3 Re. 26, b. 27, a. ; *Smith v. Wheeler*, 1 Vent. 130, S. C. 2 Kel. 774.

¹ *Davidson, &c. 9th July, 1835, F. 13 S. 1082.*

Effect of
declining the
office.

From what
circumstance
trust inferred

Allowing
name to be
used in trust
affairs, cor-
respondence,
&c.

Investiture
given.

directed sasine to be given to L M and E B, the other parties, or either of them, who should accept of the trust — and the instrument bore, that an attorney appeared for L M, E B, &c., having in his hands the trust-disposition, and that the bailie gave sasine to L M, E B, &c., or either of them who should accept of the said trust—and it was alleged by a beneficiary under the trust, that L M and E B had accepted, and no evidence was adduced on their part to redargue the allegation,—it was held that this was presumptive evidence of their having accepted.¹ The circumstance of infestment having been taken in name of a party as trustee, is not alone sufficient to infer acceptance—it merely creates a presumption which may be redargued. But he cannot put the fee out of his person, or deprive the beneficiaries of their vested rights, by a mere declaration that he has not accepted; and therefore, on his refusal, the beneficiaries are entitled to be sisted for their interest, if any.² Still more, of course, will he be liable where he positively acts as trustee, and interferes with the management of the trust-property by attending meetings regarding the trust-affairs, although he do not record his acceptance of the office of trustee, and do not sign the minutes of any meeting.³ Even where a person who had been nominated trustee without his knowledge, and infestment had been taken on the belief of his acceptance, refused to subscribe any deed, he was found obliged to denude, on being freed from all his liabilities.⁴

Attending
meetings of
trustees.

Where
appointed
without
personal
knowledge.

¹ Paul, 22d Jan. 1833, 11 S. 292.

² Megget, 8th Dec. 1827, 6 S. 224; and Spence, 15th Jan. 1829, 7 S. 254.

³ Mollison, 19th December, 1833, 12 S. 237.

⁴ Dallas, 21st November, 1710, Mor. 16191. Here the trustee was put in

But where there has been mere intimation of intention to accept, as by letter or otherwise, the party may *rebus integris* recall that intimation. Thus, where a testator, by trust-settlement, named certain trustees, of whom any two were to be a quorum — and on the death of the testator, two of the trustees accepted, and proceeded to take the necessary steps for administering the trust — and thereafter another trustee, who was abroad at the death of the testator, intimated by letter to the law agent of the trustees, that he would accept as trustee, and it was established by correspondence between the defender and one of the accepting trustees and the said agent—that in the course of that and the earlier part of the following month, a difference of opinion arose between the accepting and acting trustees and the defender, as to the mode of commencing and carrying out the business of the trust, and winding up the affairs of the testator—and that the defender, in the earlier part of the latter month, intimated that he would not act under the said trust,—it was held that he had timeously and competently declined to act.¹

the position of a trustee in England, but from our forms it was necessary that he should convey. And in England, it was held by Lord Eldon, in *Nicolson v. Wordsworth*, 2 S. W. 372, that where the intention was disclaimer, the instrument ought to receive that construction, though it was a conveyance in form. In *Attorney-General v. Doyley*, 2 Eq. Ga. Ab. 194, the trustee, who declined to act, was directed to convey; and the same decree was made in *Hussey v. Markham*, Rep. and Finch, 258. In *Sharp v. Sharp*, 2 B. and A. 405, it was held the trustees had not acted, though they had conveyed the estate, instead of disclaiming. See *Urch v. Walker*, 3 M. and C. 702.

¹ *Bannerman, &c.* 1st Dec. 1842, 5 D. 229. In England, a trustee may accept of the office, either by signing the trust-deed, (See *Buckeridge v. Giese*, 1 Cr. and Ph. 126,) or by an express declaration of his assent, or by proceeding to act in the execution of the duties of the trust. What acts amount to constructive acceptance, is somewhat indefinite. Proving the will, without more, is not sufficient to constitute a person acting executor;

Revocation
of acceptance
rebus integris.

Non-acceptance not inferred from delay.

Non-acceptance of a trust is not to be inferred from the mere circumstance of a party's delaying to accept; for although he abstain from doing so, he may still, at a future period, assume the office as trustee.¹

Acceptance for a special purpose merely.

Where, under the usual protecting clause, one of several trustees nominated declined at first to accept, but afterwards accepted to the effect of concurring in the assumption of a new trustee in the room of one deceased, which assumption was made by him in terms of the trust-deed, and for the purpose of enabling the trust to be carried on without the validity of the trust actings being exposed to doubt —he having had no connection with any of the intromissions under the trust, or with any other act of trust-administration besides the deed of assumption,—was held not to be liable either for intromissions previous to the deed of assumption, or subsequent thereto.² A trustee cannot, however,

Must accept or repudiate in toto.

Balchen v. Scott, 2 Ves. jun. 678 ; Honey v. Blakeman, 4 Ves. 607, per Lord Alvanley, but see Ward v. Butler, 2 Moll. 533 ; Booth v. Booth, 1 Beav. 125, id. ; but if the will clothe the executorship with a special trust, as where a testator directs that his "executors" shall get in certain outstanding effects, to be applied to a particular purpose, a person cannot make himself executor by proving the will, and then exempt himself from the trusts expressly annexed to the office. Mucklow v. Fuller, Jac. 198 ; and see Booth, *ut sup.* Williams v. Nixon, 2 Beav. 472. And any voluntary interference with the assets, whether with or without probate, will stamp a person as acting executor. Harrison v. Graham, 3 Hill's MSS. 239, S. C. cited Churchill v. Lady Hobson, 1 P. W. 241, note (y.) 6th ed. ; and see Orr v. Newton, 2 Cox. 274 ; Lowry v. Fulton, 9 Sim. 122 ; Stacey v. Elph, 1 M. and K. 195 ; Dove v. Everard, 1 Russ. and Myln, 231, S. C. Taml. 376, Lowry, *ut sup.* 115. Nor can a party act ambiguously, and then disclaim, as by saying he acted, not as trustee, but as factor or agent. (Conyngham v. Conyngham, 1 Ves. 522 ; and Lowry, *ut sup.* As to this subject, see Lewin on T. c. 9.

¹ Darling, 14th Jan. 1823, 2 S. 607. But in England, where the power was given to the trustees acting in the trust, and the survivor of them, it was held, that the trustees who, *in limine*, refused to act, could not exercise the power. Sharp v. Sharp, 2 B. and A. 405. This is a very proper distinction. See *sup.* p. 71.

² Blair, 28th Jan. 1836, 14 S. 361.

accept of the acting management in part, and repudiate in part; he must either accept in whole, or repudiate in whole; for unless a distinction and option be declared by the trustor, the trust-deed is to be taken as one entire deed, and to be accepted or rejected as such.¹ Thus, if a party nominated as trustee, but who does not intend to assume the office, shall, for instance, sign a document for the purpose of making a quorum to enable funds to be uplifted, he will thereby render himself liable.² Although acceptance of the trust brings the acceptor under an obligation to carry on the business of the trust, still he is not thereby vested in the estate, and has no right of property in it until he be formally vested, which is a distinct and special act.³ This, in the case of heritage, is done by the trustee taking infestment in terms of the trust-deed; and in the case of moveables, by taking possession, and giving intimation of assignment in common form. But the taking possession of moveables symbolically, merely, under a trust-disposition, cannot prevent a pointing by a creditor of the grantor, in whose custody they are allowed to remain,⁴ actual possession being necessary.

¹ So, in England, as the office of trustee and executor are usually combined as with us, if an executor be also trustee of the real estate, he cannot desert the situation of trustee, and accept only that of executor, for the acting as executor is an acceptance of the entire trusteeship. *Ward v. Butler*, 2 Moll. 533. And if a person by the same instrument be nominated trustee of two distinct trusts, he cannot divide them, but if he accept the one he will be held to have accepted the other. *Urch v. Walker*, 3 M. and C. 702.

² See *Watson*, 9th June, 1843, 5 D. 1182.

³ Thus, a trustee in heritage cannot bring an action of removing against a tenant, unless he be infest in the trust-estate, *Johnson's Trustees*, 2d July, 1803, M. 15207. So, also, precepts of sasine granted by trustees not infest, are invalid, and are not rendered effective by the infestment of an assumed trustee, *Martin*, 3 Feb. 1801, 3 D. 485.

⁴ *Fraser*, 26th June, 1830, 8 S. 982.

Formal
investiture
necessary.

Investiture
under an
obligation to
grant a trust.

Where a party has entered into an obligation to grant a trust, but the property has not actually been conveyed, and the trustee refuses to subscribe the necessary regular disposition or conveyance, recourse must be had to judicial proceedings. A personal action may be instituted against the trustee, concluding for a decree against him to fulfil his obligation. If the deed of obligation contain a special enumeration of the subjects meant to fall under the trust, the summons, besides concluding for a personal decree for implement, may contain the usual clauses or conclusions, demanding that the Court shall adjudge the property in terms of the obligation. In virtue of the decree obtained in such an action, the pursuer has this advantage, that he may either use legal execution against the person of the obligant, or, which is more beneficial, he may apply to the superior for a charter, styled a charter of adjudication in implement, and thereby complete his title, if the title of the trustee was complete. Decree of adjudication in implement may be obtained by a trustee, reserving all questions as to the validity of his author's title, and the pursuer's right derived from it¹—this being, in reality, a very common form adopted by trustees of making up titles to property conveyed to them, which may not necessarily be in the possession, or under the immediate control, of the trustee.² Various questions of defective title frequently occur, which, however, must be adjusted according to the rules of conveyancing, which it is not the object of this treatise specially to discuss. If an obligation to grant a trust do not

¹ Ranken, 11th Dec. 1838, 1 D. 222.

² See Paul, 19th May, 1829, 7 S. 621; Melville, 8th Feb. 1838, 16 S. 457.

enumerate the objects intended to fall under it, the summons concluding for implement ought to contain an enumeration and description of these subjects. Decree for implement, by executing a conveyance, being obtained against the trustor personally, a separate action concluding for adjudication of the property, in implement of the personal obligation, becomes requisite. If the trustor be dead, the trustee may charge the heir to enter, and convey to him; and failing his doing so, may adjudge in implement of the trust-deed.

The right of a trustee to a lease by assignation, is completed by entry of the assignee's name, as tenant, in the landlord's rental-book.¹

Investiture
under a lease.

¹ Yeoman, 2d Feb. 1813, F.

CHAPTER IX.

INTEREST REMAINING IN THE TRUSTER.

Parties in
trusts.

IT may be observed generally, with regard to the parties concerned, that in relation to them, and their interests, trusts are of two kinds,—first, where there are a truster, a trustee, and a beneficiary; or, second, where there are merely a trustee and a beneficiary. The import of which is, that where a trust creates a vested interest in a third party, there is an absolute conveyance of the property conveyed in trust; but where a trust is created for a special purpose, as the payment of debts, mortifications for charitable purposes, &c. the truster retains either a radical right in the subject conveyed, or at least an interest in it, which transmits to his heirs.

Effect of dif-
ferent kinds
of conveyance

As already mentioned,¹ the right of the truster is considerably affected by the particular form of the trust-deed. A disposition which *in græmio* contains a declaration of trust for special purposes, as for creditors, does not divest the grantor, but merely burdens his right. Thus, a party who had granted a disposition *omnium bonorum* in a *cessio*, having raised a process of accounting regarding part of his

¹ See part i. cap. 3.

property, and thereafter obtained a retrocession, it was held, that the radical title having been in his person, burdened only with the disposition, the retrocession removed that burden, and entitled him to insist in the action.¹ Whereas, a disposition which is *ex facie* absolute, but is qualified by a separate back-bond by the disponee, containing a general declaration of trust, does divest him, leaving him merely creditor on the trustees' obligation to reconvey.²

A trust cannot properly be created by a party for his own behoof, excluding his creditors.³ The case of a trust, proceeding on the statement by the granter, of his conviction of his incompetency to manage his own affairs, is properly a case of factory, proceeding on a voluntary bond of interdiction, and does not prevent creditors, whose claims have arisen previous to the creation of the trust, from attaching the estate. Such an obligation, however, is irrevocable by the granter, and on it questions may be raised by the trustees, as to the validity of claims arising subsequently to the creation of the trust.⁴

A trust conveyance, apart from bankruptcy, does not divest the trustor, unless an interest be thereby created in a third party. Trusts to take effect during the lifetime of the trustor, may be revoked before delivery; after delivery they become irrevocable, donations being irrevocable on delivery, by the

Trust for
behoof of
trustor solely,
incompetent.

Interest
created in
third party.
Delivery of
trust-deeds in
trusts inter
vivos.

¹ Barry, 14th Nov. 1829, 8 Shaw, 53; Do. 30th May, 1827, 5 Shaw, 727.

² Robertson, 14th Jan. 1840, 2 D. 279.

³ See E. of Roseberry, 1st July, 1823, 2 Shaw, 443.

⁴ This limitation, voluntary or judicial, of the right of proprietors to alienate their land estates on account of foolish prodigality, where insanity cannot be proved, is not recognized by the law of England.

For behoof of law of Scotland.¹ Trusts may also be revoked, if gratuitous, and not to take effect until the death of the trustor; and more especially when undelivered—in which latter case they are revocable, although delivery be made during the lifetime of the trustor.²

For creditors. Trusts for creditors named and accepting, being in the nature of bonds for their behoof, may be redeemed by the trustor; and where

Acceding.

Not acceding.

Privilege of revocation, how lost.

not acceded to by the creditors, are revocable at the pleasure of the trustor;³ for the privilege of revocation cannot be lost to the trustor by the act of any one but himself, or of some one specially authorized by him.⁴

Donations inter vivos et uxorem.

Donations between husband and wife are revocable, if of more than a reasonable provision, or if above what was stipulated for by an antenuptial marriage-contract.

For children born, or to be born.

A trust for behoof of children born, or to be born, is irrevocable, if delivery has been made to the trustees, and they have taken infestment or possession where necessary.⁵ In the case of a trust for children born, there is a distinct interest created in such children. In the case of trusts for children to be born, the estate vests in the trustees; and, there-

¹ Macdowall, 10th July, 1833, 11 S. 952. This is not inconsistent with the case of Edgar, 12th June, 1828, 6 S. 963, that being a special case, decided on the principle, *debitor non presumitur datur.*

² Miller, 11th July, 1826, 4 S. 822; Sommerville, 18th May, 1819, F. C.

³ So also by the law of England, trusts for creditors, whether named in the deed or otherwise, are revocable, unless communicated to the creditors, Lewin on Trusts, 85; Langton v. Tracy, 2 Ch. Re. 30; Leech v. Leech, 1 Ch. Ca. 249; Wallwyn v. Coutts, 3 Mer. 707, S. C. 3 Sim. 14; Garrand v. Lord Lauderdale, 3 Sim. 1, S. C. 2 R. and M. 45; Acton v. Woodgate, 2 M. and K. 492; Page v. Brown, 4 Russ. 24, S. C. Aff. 2, R. and M. 214; Ravenshaw v. Hollier, 7 Sim. 3; Bill v. Courten, 2 M. and K. 511.

⁴ Pagan, 17th Jan. 1823, 2 S. 125; Barbour, 25th Jan. 1831, 9 Shaw, 334.

⁵ Smitton, 12th Dec. 1839, 2 D. 225; Turnbull, 1 W. S. 80.

fore, the rule that a fee cannot be *in pendente* does not apply, for the fee is in the trustees, and must remain so, whilst a possibility exists of a right arising in the estate, preferable to that of the party creating the trust, viz., the birth of a child of the particular marriage in question, for it would not apply to the children of any subsequent marriage which might be entered into by the trustor, if a particular marriage be mentioned. But in a trust Substitution. for behoof of certain parties, as the children of a certain marriage, whom failing, to the trustor's heirs-at-law, does not create such a right in them as to prevent the subsequent revocation of the deed, or ulterior destination of the property contained in it, their chance of succession being still the same, as in the case of there being no destination, and, indeed, depending on the event of there being none.¹ A trust made by a woman, in contemplation of marriage, for behoof of herself and her children *nascituris*, and excluding the husband's *jus mariti*, is effectual against joint obligations granted by the husband and wife *stante matrimonio*.²

Trust by a woman in contemplation of marriage.

The rule that a trust is revocable, if made for the benefit of the trustor alone, suffers an exception in the case of a woman, by whom a trust of heritage, excluding the *jus mariti* as to it, and declared irrevocable, has been made *in gremio* of an antenuptial marriage-contract. In the case of *Torry Anderson v. Buchanan and others*,³ it was held, that the trust was irrevocable during the marriage, although no right or interest was created in third parties; but that

Exception to rule as to trust for trustor solely. Exclusion of *jus mariti*.

¹ *M'Leod*, 20th July, 1841, 3 D. 1288.

² *Sandilands*, 30th May, 1833, 11 S. 665.

³ 2d June, 1837, 15 S. 1073.

such a trust may be revoked on the death of the husband, the cause of granting, viz., the influence of the husband, being at an end. This is altogether a special case, and does not affect the general rule.

Deed, when declared irrevocable.

In trusts creating a burden on the trustee's estate, or restraining his power of administration, the deed is usually declared to be irrevocable, and this has the effect of creating an absolute conveyance. In the case of Torry Anderson, the question as to the trust being revocable, although declared in the deed not to be so, arose in consequence of there being no interest but that of the trustee; and one of the judges (Lord Mackenzie) held, that the declaration of its being irrevocable was, even in that case, sufficient. The general rules in regard to trusts are, that onerous mutual contracts between husband and wife,¹ and onerous obligations or deeds for behoof of third parties, are irrevocable. But any deed, in the nature of donation *inter virum et uxorem*, is revocable, although in the form of a trust, and however framed;² and this has been held to apply even where the deed in question contained a provision in favour of children.³

Revocation with consent of children.

The nomination of a trustee, in a deed executed by a man and his wife for behoof of their children, was held to be revocable by the parents, with consent of the children, most of whom had arrived at majority, the *jus quæsumit* of the children not being

¹ Campbell, 17th Jan. 1749, M. 6121.

² See Paterson, 17th July, 1677, M. 10284; Gaywood, 3d June, 1828, 6 S. 909; Moffat's Trustees, 7th Dec. 1821, 1 S. 195; Marshall, 17th May, 1826, 4 S. 581; M'Neil, 8th Dec. 1829, 8 S. 210; Currie, 22d Jan. 1835, 13 S. 290.

³ Thomson, 20th Feb. 1838, 16 S. 641.

affected, although no power of revocation was contained in the deed.¹

In trusts by associations, as dissenting chapels, &c., the trust is created for behoof of the trustees, and they retain the power of revocation, which is the only proper case in which the characters of truster, trustee, and beneficiary, are retained without special declared reservation, the constitution of the trust being completed by delivery, &c.

In the case of moveables, until actual possession be taken by trustees, although there be symbolical possession as by inventories, the property of the trust is subject to his debts, if it remain in the possession of the trust, the transference being still incomplete.²

Besides the power of revocation remaining in the trust in certain cases, as now mentioned, there are a variety of cases in which the trust retains important interests in the trust-estate, notwithstanding its being vested in the trustees named in the trust-deed. Thus, a party having raised an action against trustees, concluding, not merely that they should be ordained to execute a discharge of an heritable bond granted by him, but also to have it declared that the debt was extinguished, and his lands disburdened,—it was held, that he was bound to call the party the grantor of the trust, who had the real interest in the fund.³ Thus, also, although, by a conveyance in trust, the estate becomes vested in the trustees, who acquire the full power of

Trusts by associations.

Effect of
actual and
symbolical
possession of
moveables.

Rights in
trustee.

When must
be made
party to
action.

In trust for a
special pur-
pose—right
of superinten-
dence—trust
for sale.

¹ Scott, 22d June, 1773, M. 6585.

² Gibson, 29th March, 1841, 3 D. 974; Earl of Roseberry, 1st July, 1823, 2 S. 443; Borthwick, 17th Feb. 1829, 7 S. 420; Fraser, 26th June, 1830, 8 S. 982; McGill, 21st Dec. 1833, 2 D. 277.

³ Bell, 13th December, 1828, 7 S. 198.

management, still, in the case of a trust for a particular purpose, as for payment of debts with powers of sale, the truster has a right to see that the trustees conduct themselves properly in their administration, and may therefore take legal measures to enforce it, where the trustees do not exhibit such a satisfactory state of accounts as shall

*For payment
of debts.*

fully explain their actings.¹ For in every case of private trust for payment of debts, the trustees are accountable to the truster, as well as to others interested in the management, and they are bound to pay over to the truster the surplus funds, after paying the debts. But the actings of the trustees

*Acts of trustees binding
on truster
and acceding
creditors.*

are valid, and binding on the truster, and also on the creditors, where they have acceded to the trust. Although there can apparently be no surplus, after payment of just and lawful debts, yet where he can shew reasonable ground of suspicion, the truster may still have title and interest to call the trustees to an accounting, to the effect of ascertaining that justice has been done to himself and his creditors.²

*Interest of
truster where
no surplus.*

*Adjudication
of trust-
estate.*

Where a trust has been created by a party for a special purpose, before being legally bankrupt, the granter is not so far denuded of his property, as to invalidate an adjudication led after the truster's death by non-acceding creditors, upon a special charge given to the apparent heirs of the truster;³ for a trust for behoof of creditors does not divest the truster so as to affect diligence, or prevent the truster from disposing of the property subject to the burden of the trust; as the radical right remains in

¹ Pender, 17th Nov. 1831, 10 S. 19.

² Martin, 8th December, 1836, 15 S. 227.

³ Campbell, 14th Jan. 1801, M. App. Adjudication, 11.

the trustor, as well as his right of redemption, and right to the remainder, if any, after paying his just and lawful debts; nor does it give any preference to particular creditors.¹

Such is the right and interest remaining in the trustor, that a trust-disposition of an estate for behoof of creditors, with powers of sale, subject to an obligation on the trustee to reconvey the remainder, if any, although followed by infestment, does not so divest the trustor of his radical right to the lands, that although a reconveyance by the trustee be informal, yet the trustor can, in virtue of his radical right, execute an effectual entail by procuratory of resignation.² And where an heir in possession of an entailed estate destined to the heirs-male of his body, with prohibition against altering the order of succession, had no issue male—and granted a disposition of his estate for his life, with procuratory and precept, to a trustee for behoof of his creditors—and thereafter obtained an open charter of resignation in favour of the heirs of entail, for the purpose of creating a freehold qualification—and disposed a part of the estate to his brother, who was the heir-presumptive of the entail, assigning to him the open charter, but under all the prohibitions and conditions of the entail which were engrossed in his brother's titles,—it was held, that the existence of the trust-deed was no bar to the conveyance.³ In both of these cases, the trustor did nothing inconsistent with the previous trust-conveyance, as a

Actual right
of trustor in
trust for sale.

May make
entail.

¹ Elibank, 15th Feb. 1716, 5 B. Sup. 906; Harrower's Trustees, 16th Feb. 1827, 5 S. 374; Barbour, 7th July, 1826, 4 S. 806; Pagan, 17th Jan. 1823, 2 S. 125.

² Macmillan, 4th March, 1831, 9 S. 551, Aff. 28th June, 1832. S. Sup. 7.

³ Macleod, 17th Nov. 1827, 6 S. 77.

Principles
applicable to
such cases.

trust-conveyance for behoof of creditors cannot prevent the trustor from disposing of the fee, subject to the burden created by the trust. Thus, before the 3d and 4th William IV. c. 65, (reform act,) a trust-conveyance for behoof of creditors did not take away the right of voting for a member of Parliament.¹ The principles applicable to such questions as these, are very clearly brought out in the case of M'Millan *v.* Campbell,² the opinion of Lord Moncrieff, in which, as contained in his note, (affirmed by the Court,) was founded chiefly on the case of Campbell of Edderline,³ in which the trustor, who stood infest, had conveyed his estate, heritably and irredeemably, to trustees, expressly for payment of his debts, with power to sell, and under an obligation to reconvey any residue under a strict entail. The trustees being infest, and the trustor having died, a competition arose between adjudgers from trustees and prior adjudgers, who had proceeded directly against the estate, as *in hæreditate jacente* of him, by charging his heir to enter. As to which his Lordship goes on to observe, that there could not be a more perfect state of the case for trying the question, whether the feudal title subsisted in the trustor; that the creditors who adjudged the *hæreditas jacens*, did not adjudge any mere *jus crediti*— they adjudged the estate itself, by charging the heir to enter, which charge necessarily implied that it was competent for the heir to be served in special as heir of the investiture; and accordingly, the interlocutor of Lord Eskgrove, adhered to by the Court, expressly found that the

¹ Lockhart, 10th Feb. 1819, F.

* *Ut sup.*

² 14th Jan. 1801, M. App. Adjudication, 11.

truster was not completely divested of the real right and property of his estate by the trust-right and infestment thereon, founded on by the objectors—the same being a trust for the grantor's behoof, though it contained a power of selling the land, &c. That his Lordship was of opinion, that whenever an estate can be adjudged as *in hereditate jacente*, to the effect of carrying a feudal title by charter of adjudication, it must be equally competent for the heir to be served and infest; and that he thinks it a self-evident proposition, that whenever a man's title so stands by his investiture, that upon his death his heir might be served, and get a feudal title directly as heir, he himself must be *in titulo*, while alive, to convey the estate, subject to all existing burdens; because, if his investiture subsist to the effect of the estate being carried by the service of his heir, he must have, by his sasine, the powers of an undivested fief to convey, however he may be restrained by conditions, or affected by burdens. That the same question occurred much more lately, in the case of Bellenden Ker *v.* the Trustees of Lady Essex Ker,¹ in which John, Duke of Roxburgh, having conveyed his whole unentailed estates to trustees for payment of his debts, and then for purposes to be appointed by him—and on his death, the trustees having been infest on his estate, the heirs-at-law, Lady Essex and Lady Mary Kers, challenged the deed by which the residue was settled, and having succeeded, obtained a conveyance from the trustees, and completed their title—but thereafter, a defect having occurred in regard to the transmission of a part of the estate

¹ 7 S. 454, 8 S. 694, 9 S. 15, 1 W. S. 381.

from Lady Mary to Lady Essex, in consequence of which Bellenden Ker and others, as heirs-at-law, claimed those lands, as not having been so vested in Lady Essex as to warrant her conveyance of them—and in order to obviate this plea, it was maintained, that Lady Essex and Lady Mary Kers, before getting the title from the trustees, had made up a title by adjudication upon a trust-bond directed against the estate, as *in haereditate jacente* of Duke John; and that, as Lady Essex had a general service to Lady Mary, this title by adjudication, which remained personal, was sufficient to vest a personal right in her, which she could convey. The Court there had no doubt that the adjudication by trust-bond was a valid title, clearly assuming that a feudal title remained in the Duke, and in his *haereditas*, notwithstanding the trust-deed, and the infestment on it. It was found, indeed, to have been superseded by the complete feudal title established under the conveyance of the trustee. This view of the Lord Ordinary was entirely concurred in on appeal,¹ and the case was affirmed, on the ground that it was a pure question of Scotch conveyancing; that if the trustor had been living in England, a Court of Equity—though he had made such a conveyance—would have compelled the person in whom the legal estate was, to complete his conveyance; that it would have been imperfect at common law, but that this difference may be accounted for by the circumstance of the Courts in Scotland exercising a jurisdiction of law and equity combined; that a trustee holding under such a deed in England would have been compelled to reconvey.

View taken
on appeal to
House of
Lords.

¹ *Ut sup.*

A debtor, by granting a trust-deed acceded to by his creditors, is not absolutely precluded from applying for sequestration, which may be necessary to prevent preferences.¹

Where an apparent heir conveys his ancestor's estate to trustees, for the purpose of paying the ancestor's debts, and without the view of appropriating the property to his own use, no representation on passive title is thereby incurred.²

It is not unusual, in trusts for creditors, for the trustor to reserve a claim for an alimentary allowance out of the trust-funds.³

A party, who has conveyed his estate to trustees for payment of debts, reserving to himself only an alimentary allowance, and has gone abroad, must insist a mandatory in actions to which he is a party.⁴ And a trust-deed for creditors, as to heritage alone, is not a sufficient mandate to carry on an action for payment of an ordinary personal debt, raised by the trustor, who has gone abroad.⁵

Trustor in
trust for
creditors
acceded to,
may apply
for sequestra-
tion.

Apparent
heir.

Reservation
of allowance
to trustor in
trust for
creditors.

Trustor
abroad,
mandate by.

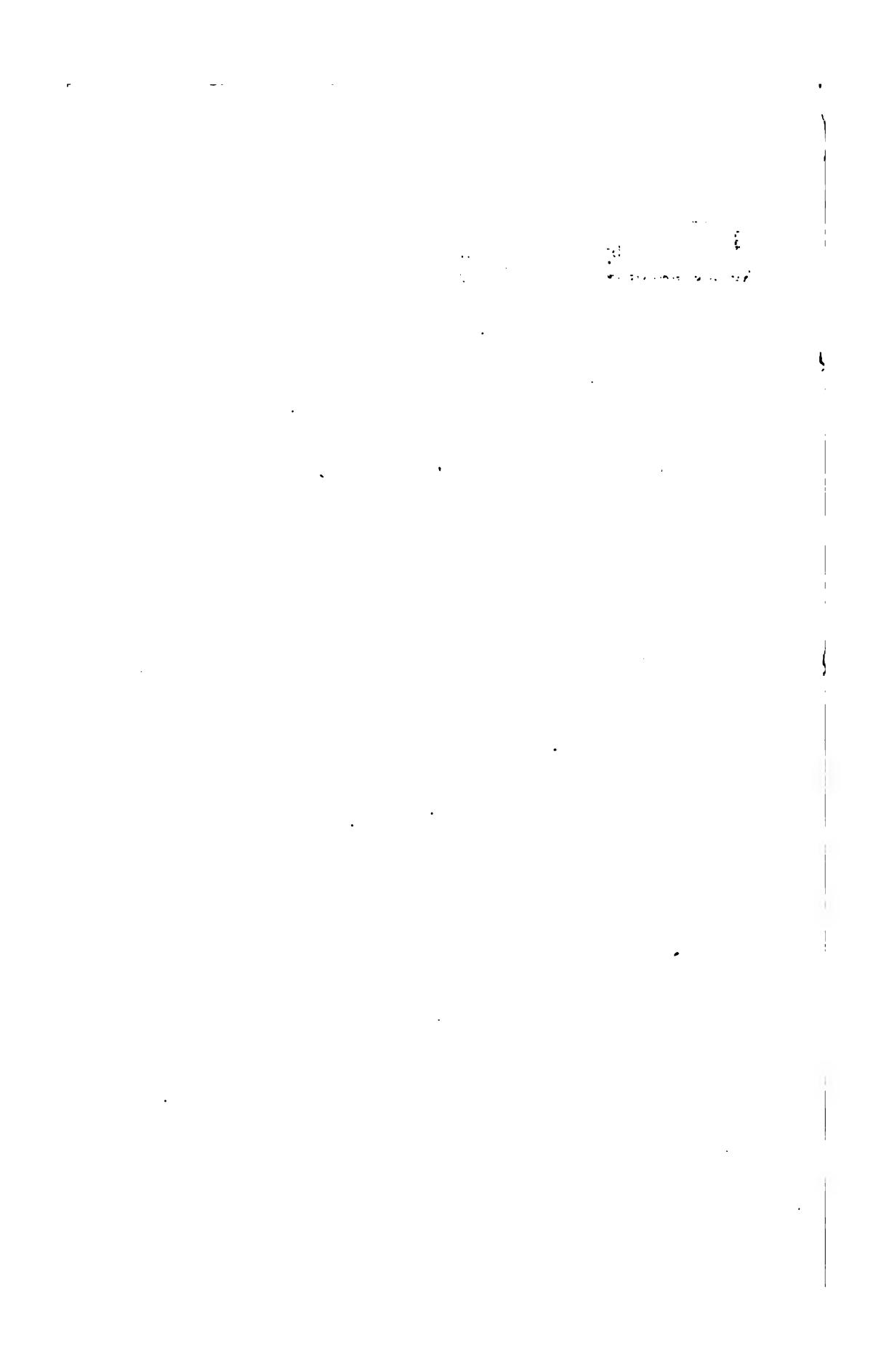
¹ Earl of Kellie, 28th Feb. 1821; Thomson, 24th Feb. 1827, 5 S. 468.

² Creditors of Bryce, 18th May, 1791, M. 9734; Blount, 26th Feb. 1783, M. 9731. See also Kirkpatrick, 17th Feb. 1838, 16 S. 608.

³ See Brown, 31st May, 1836, 14 S. 856; Earl of Buchan, 11th July, 1835, 13 S. 1112; Hamilton, 8th March, 1839, 1 D. 668.

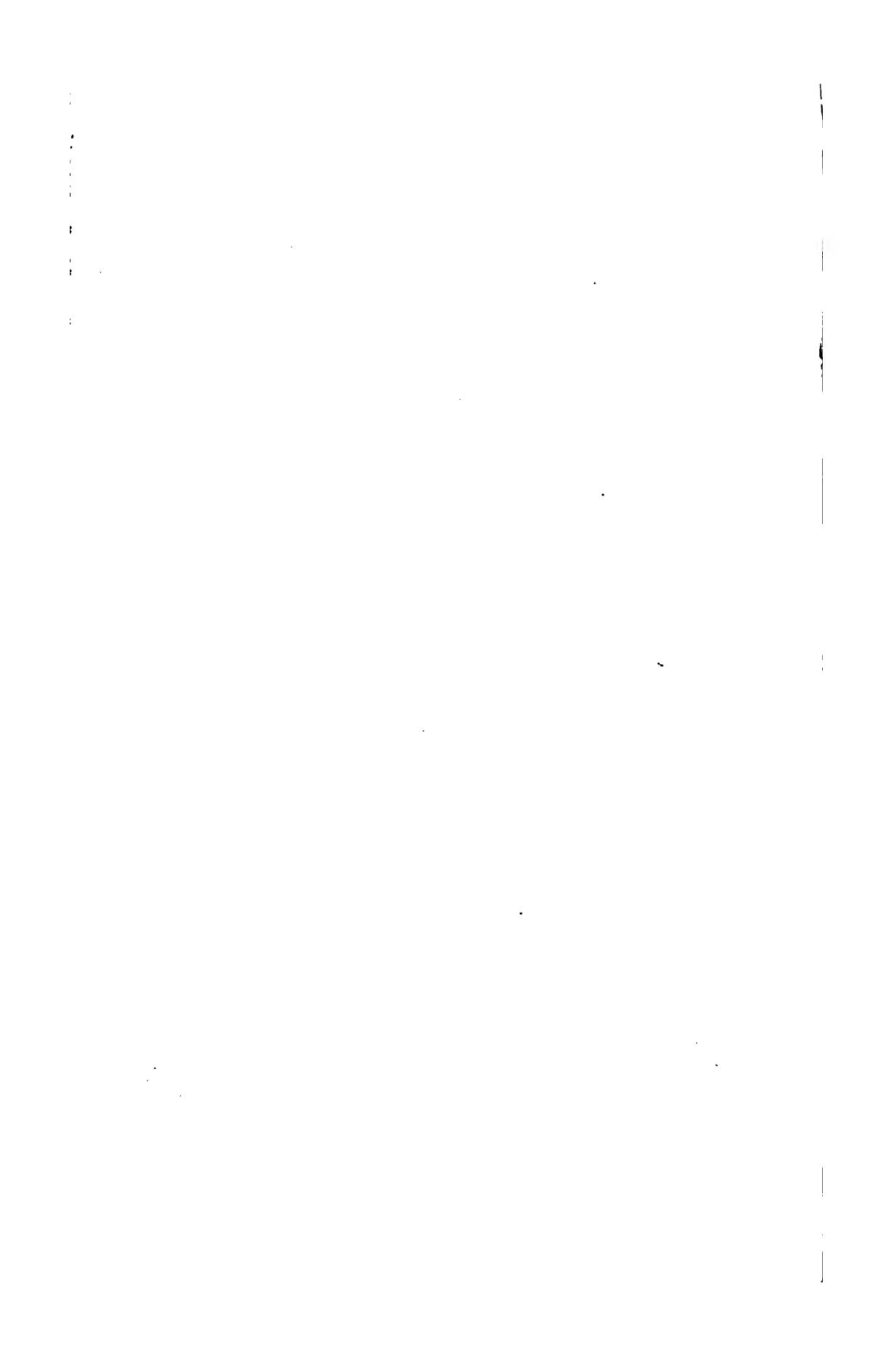
⁴ Fairly, 19th Jan. 1839, 1 D. 399.

⁵ McNeill, 10th July, 1832, 10 S. 806.



P A R T II.

OFFICE OF TRUSTEE, AND ADMINISTRATION OF TRUSTS.



CHAPTER I.

WHO MAY HOLD THE OFFICE OF TRUSTEE, AND OF THE RESTRICTIONS APPLICABLE TO IT.

WITH the exception of an unrecalled sentence, High treason
a disqualification ; alien ;
enemy. convicting a party of high treason¹—and that, by the law both of England and Scotland, an alien enemy cannot be a trustee, as he can have no *persona standi in judicio* in any court in this country; and that although an alien may discharge the office of trustee, in so far as regards moveable property, still he cannot hold heritage, nor sue with regard to it²—the law of Scotland, otherwise, makes no positive limitation as to who shall be competent to hold the office of trustee, that being an office created at the discretion of a party or parties, with a view to the administration of his or their estates; it may, therefore, be held as a general rule, that any one may be appointed a trustee, who is capable of conducting his own affairs. Thus, a married woman may be a trustee, and *sine qua non*; and where a husband and wife are named trustees, the wife is entitled to act and vote separately from her husband; but if her husband shall interfere *in limine*, he may prevent her from assuming the trust; if he do not

No other
special limita-
tion.

Married
woman.
Office of
trustee, and
administra-
tion of trusts.

¹ Mackenzie, Elch. Trust, No. 4.

² Gilb. on Uses, 43.

interfere *in limine*, he will be held as authorizing the acceptance of the trust. It appears to have been assumed, in the case of *Stoddart v. Rutherford*,¹ that if a woman be named a trustee before marriage, her supervening marriage will incapacitate her from continuing to hold the office; but this last appears to be as yet an open question. It, however, appears, that notwithstanding the power which a married woman has of acting as a trustee, independently of her husband, still she cannot sue in that capacity without the concurrence of her husband,² in consequence of the liability incurred by trustees in litigating with third parties.³

Disqualifying circumstances Although there be no legal restrictions as to parties who may be appointed trustees, still there are circumstances, which in the case of their supervening after the trust shall have been vested, are sufficient to constitute an objection to the continuance of the trustee, on the ground of his having come to be in a position, which by inference is to be held as not having been anticipated by the trustor, and which, had he anticipated, he would probably have provided for, or not have appointed such party to that office. Thus insolvency, although not an absolute and invariable ground of removal, is in many cases sufficient to disqualify a trustee. The tendency of the most recent cases, clearly is to hold this as a disqualification, but under certain distinctions. It may perhaps be a question, whether, when there are other trustees, the bankruptcy of one

Insolvency.
In certain circumstances a disqualification.

¹ *Stoddart*, 30th June, 1812, F.; *Darling*, 14th Jan. 1828, 2 S. 607, Aff. 11th May, 1828, 1 W. S. 188. This has been held a ground of removal in England. *Lake v. De Lambert*, 4 Ves. 592.

² *Laird*, 16th Nov. 1833, 12 S. 54.

³ See *inf.* part 2, c. 8, s. 1.

will prevent him from continuing to act along with the others, but the case of difficulty, is where there is only one, either actually or virtually, and it thus becomes necessary to provide for the administration of the funds. In such cases, the Court has usually appointed a judicial factor to supersede the trustee,¹ or where the continuance of the trust was unnecessary, it has ordained the trustee to denude in favour of the beneficiary.² These were *ex parte* cases, however, and from the recent case of Macpherson,³ it does not appear that this can be held as an invariable rule. In that case the trustee was not a party appointed by the testator, but substituted in virtue of a power in the deed to that effect, so that there was no proper *delectus personæ*, which was held to be an important circumstance in appointing a judicial factor in his stead. It is also an important circumstance, at whose instance the petition for the appointment of a factor is presented. Thus the Court declined to appoint a factor to execute the purposes of the trust, in room of a trustee who had become insolvent, on the application of the trustee alone, but did so on the concurrence of a party, beneficially interested under the trust, being obtained.⁴ Where an only surviving trustee for behoof of a lunatic, had recently been bankrupt, and had got a discharge on a composition, the Court appointed a *curator bonis*, with power to call the trustee to account,⁵ notwithstanding that the deed contained a power of substituting new

Remedy.
Judicial
factor, &c.

Not an invari-
able rule.

At whose
instance
appointment
demanded.

¹ Towart, 14th May, 1823, 2 S. 305; Christie, 3d Feb. 1827, 5 S. 293; Smith, 15th May, 1832, 10 S. 531; see also opinion of Lord Ordinary in Cowan, 20th Jan. 1837, 15 S. 398.

² Macdowall, 20th Nov. 1789, M. 7453. ³ 19th Dec. 1840, 3 D. 315.

⁴ Christie, *ut sup.* ⁵ Robertson, 11th March, 1829, 7 S. 573.

trustees. In this case, the trust had been confided to several trustees, and when there came to be but one surviving of those appointed, the substitution of new trustees might very properly be considered as the exercise of a discretion, of too great importance to be confided to a party in bankrupt circumstances.

It may be necessary, in many cases, thus to provide for the present security of trust-property, but the question then comes to be as to the effect of the appointment when made. The appointment of a judicial factor, or *curator bonis*, does not necessarily divest the trustee; it may, or may not, do so, according to circumstances.¹ It will apparently, from the cases above referred to, do so where there is only one existing trustee, and the duties of his office may be done by a mere factor or manager, as in managing the estate, or investing the funds, or even dividing the residuary estate among those having the beneficiary or residuary interest, where directions are specially given in such a manner as that they can be executed by a factor; for these two offices, so far as regards management of funds, at least, seem incompatible with each other. Where, however, powers are specially intrusted to a particular party, and are of so special a kind as to be evidently the result of exuberant confidence placed by the trustor in the party appointed, or are of a purely discretionary nature, the case is different. Thus, for instance, in the case of bankruptcy, a trustee in such a situation is *tanquam suspectus*, he has lost that confidence which renders him a fit and proper person to administer the residuary interests of the beneficiaries.

Effect of
appointment
of judicial
factor, when
made.

¹ Wotherspoon, 15th Dec. 1775, M. 7450.

Yet the difficulty lies in this,—that where the powers are of a purely discretionary nature, it has been held, and undoubtedly correctly, that such powers do not devolve upon the court,¹ and, therefore, cannot be delegated by it to a trustee, who is the only proper party to be invested with extensive proprietary powers;² and the question then is, whether the trustor's intentions are to remain unexecuted, and probably the main object of the trust defeated, by the circumstance of the trustees becoming bankrupt.³ Any act affecting the trust-worthiness of a trustee, which is cognizable by a court of law, will necessarily incapacitate him from holding so onerous an office.⁴ Thus, for instance, it is very common to appoint trustees, likewise tutors and curators for minors, beneficiaries under trusts. Accordingly, where a party disposed his estate to

Acts affecting
trust-worthi-
ness.

¹ See part 2, c. 4, s. 2.

² See Remedy where the office of trustee has lapsed, &c., part 2, cap. 4, s. 8.

³ By the law of England, a bankrupt may be removed from the office of trustee at the instance of the cestuique trust. *Bainbrigge v. Blair*, 1 Beav. 495; *In re Roche*, 1 Conn. and Laws. 306.

⁴ It has also been held as a ground of removal, if a trustee refuse to act; *Maggeridge v. Grey*, Nels. 42; *Travell v. Danvers*, Finch. 380; or if the trustees of a chapel entertain opinions contrary to the founder's intention; *Attorney-General v. Pearson*, 7 Sim. 290, 308; *Attorney-General v. Shore*, Ib. 309, 317; or if a trustee misconduct himself; *Mayor of Coventry v. Attorney-General*, 7 B. P. C. 235; as by dealing with the trust-property for his own personal advancement; *Ex parte Phelps*, 9 Mod. 357, by suffering a co-trustee to commit a breach of trust; *Ex parte Reynolds*, 5 Ves. 707, or by absconding on a charge of forgery; *Millard v. Eyre*, 2 Ves. jun. 94. But some specific charge must be made, and not a mere averment of general malice or personal hostility; *Earl of Portsmouth v. Fellows*, 5 Mad. 450; and a trustee will not be dismissed from caprice on the part of the cestuique trust, *O'Keefe v. Calthorpe*, 1 Atk. 18, nor on account of a mere error of judgment, *See Attorney-General v. Cooper's Company*, 19 Ves. 192; *Attorney-General v. Caius College*, 2 Keen, 150. As to this, see also, Lewin on Trusts, 594, 595, &c.

trustees, for behoof of two sisters and their minor children, with legacies to several other persons, the trustees being also named tutors and curators to the children, and declared not to be liable for omissions, or *in solidum*, — and upon a complaint against them, on the statute 1696, c. 8, as having failed to find caution when called upon, were removed as suspected tutors, and discharged from farther administration of the minors' effects, all interested having again petitioned the court to appoint, *ex nobili officio*, another trustee, to denude the former and bring them to account, — the court declined to do this, but nominated a factor *loco tutoris* on the subjects mentioned, with the usual powers, and specially with power to bring a proper process for denuding the trustees, if he should be so advised.¹

Where there
has ceased to
be a quorum.

When caution
required.

Where the trustor has not placed implicit confidence in one trustee, but has appointed several, and, by some cause, there has ultimately come to be one trustee only, or only one acting, or capable of acting, the court will interfere where necessary, and will order him to find caution, appoint a judicial factor, or otherwise, as it shall think fit. Thus, where a trust-settlement was conceived in favour of the trustees, and the survivor of them, and one of the two surviving trustees became insane, the court granted authority to the other trustee to wind up the trust, with the full powers conferred on the trustees, or survivor, by the deed, but only on condition of his finding caution.² Where there was only one accepting and acting trustee, and an action of multiplepoinding was raised, at his instance,

¹ Wotherspoon, 15th Dec. 1775, M. 7450, and 16372.

² Fraser, 1st March, 1837, 15 S. 692.

against the creditors, heirs, and legatees of the trustor, he was, on the motion of several legatees, ordained to find caution in respect of funds realized and not distributed.¹ Personal objection, or want of power, is therefore very strictly interpreted and enforced against trustees;² but still the court will not interfere unless there decidedly be such objection or want of power. Thus, although there perhaps may not be the plea of *delectus personæ* so strong in the case of substituted trustees, as in those actually named by the trustor,³— where the survivor of three trustees, within a few days of his death, and in reference to a power conferred by the trust-deed, assumed a new trustee — and a reduction of the deed of assumption was raised, and a bill of suspension against the new trustee's interference with the trust-estate was passed, but interdict was refused,— a petition for the appointment of a judicial factor on the trust-estate, on the ground, that as the trustee's right was under challenge, he should not be allowed to intromit with the funds, as he was not bound to find caution, was refused, with expenses.⁴

General rule
as to inter-
ference of
Court.

Non-residence, whether the party or parties appointed shall be resident in England or in a foreign country, is not such a ground of objection to the appointment of a trustee as to render it invalid; but such appointments ought to be avoided where it is possible to do so, as non-residence is a circumstance totally at variance with the character and object of that office, and unless sufficient provision be made for conducting the business of the trust, and carrying it

Effect of non-
residence.

¹ Ryrie, 7th March, 1839, 1 D. 647.

² See case of Niabet, *inf.*

³ See case of Macpherson, 19th Dec. 1840, 3 D. 315.

⁴ Roughhead, 5th March, 1833, 11 S. 516.

100 WHO MAY HOLD THE OFFICE OF TRUSTEE, AND

into effect, in this country, in the event of any question arising regarding the trust-estate, or manner of conducting it, or matter requiring, in any way, greater authority than is possessed by a trust-factor, — the court will, on the application of any party interested, appoint a judicial factor.¹ Though a trustee be resident abroad, or shall have gone abroad subsequent to his appointment, the character of trustee still adheres to him. He is not thereby disqualified from exercising any power, as trustee, consistent with the objects of the trust, and for the benefit of parties interested in the trust. And if he should return to this country, he might resume the management of the estate, and call on the court to supersede the appointment of a factor or *curator bonis*, should such have been appointed in the interim.² Thus, where a testatrix recommended to her trustees never to allow their number to be reduced below two, without supplying the deficiency — and provided that a single trustee should have power to act in case there should at any time happen to be no more than one trustee in the existing nomination — and one of two accepting trustees went abroad, — it was held, that a judicial factor should be appointed on the trust-estate, in respect that the trustee remaining in this country had not power to act alone, or, at least, that his power was extremely doubtful.³ So where two out of a certain number of trustees were declared a quorum, whilst two remained alive,

¹ The existence of a trust-factor, it will be observed, would not affect the matter, as that is merely an office of a subsidiary nature, and not acknowledged in a court of law otherwise than as a competent manager under trustees.

² Cowan, 20th January, 1837, 15 S. 398.

³ Nisbet, 31st Jan. 1835, 13 S. 884.

and their number was reduced to two, it was found incompetent for one of them to act as sole trustee, although the others resided permanently in England; and therefore, that the trustee in Scotland could not affect the trust-estate, though, in so far as advances were made to the extent of the annual proceeds, and applied according to the directions of the trust, or for the purposes of making up titles, and in the necessary management of the trust, such advances were just debts against the trustees and the trust-estate.¹

¹ *Herriot's Trustees*, 8th March, 1836, 14 S. 670.

CHAPTER II.

IDENTIFICATION OF TRUSTEES APPOINTED BY TRUST-
DEEDS.

- Name or description.** TRUSTEES may be appointed, not only by name, but by any such descriptive reference as shall be sufficient to point out the person or persons intended, whether by official situation, or as the legal successors of a person nominated, or as a party to be nominated, by a particular person, public body, or private society; thus, it is only necessary that there shall be a proper reference to a particular individual, by name or otherwise, or to a party that is, or is to be, in a certain office, or as proprietor of certain lands, or that power shall be granted to an individual or individuals, corporate or sole, to appoint trustees, either by reference to certain persons, or their successors in office, or otherwise.
- Public capacity.**
- Property.**
- Circumstances causing difficulty of identification.** But where trustees are appointed, or authorized to be so, otherwise than by name or distinct explanation of the party or parties intended, and provision made for the event of decease or incapacity, there are necessarily circumstances which must give rise to considerable difficulty as to the identification of the party intended. Thus, in a question as to a right of patronage, where the founder of an hospital
- Changes in offices referred to.**

gave the patronage to the magistracy, town-council, and the four ministers, commonly called the town's four ministers of the old and new churches, and to their successors in their respective offices, and there were only two collegiate churches, and four ministers at the time — a difficulty arose from the burgh being afterwards divided into six parishes, having each a single clergyman, — it was there held, that only four of these ministers could be patrons, two of them being always the ministers of the churches referred to in the deed of foundation, and the other two being chosen according to the seniority of their appointment as town ministers, or if coeval in that respect, then by their seniority as licensed clergymen.¹ And where a party who was born, and resided, and died in a particular town, executed a deed of settlement dated there, in favour of trustees resident there, and by codicil, likewise dated there, bequeathed a sum of money to be laid out in lands, for the maintenance of a school, to be under the management of the magistrates and ministers of the established church, — it was held, that the bequest was not void from uncertainty, and that the magistrates and ministers of the town in question were those referred to.²

Where an hospital was founded for educating the orphan and destitute sons of freeman of a burgh, and by the will of the founder, and the statutes of the foundation, the government of the hospital was intrusted to the provost, magistrates, and ordinary council of the burgh, and to the ministers of the burgh, for the time being, and at the date of the

¹ Governors of Gordon's Hospital, 8th July, 1831, 9 S. 909.

² Murdoch, 30th Nov. 1827, 6 S. 186.

foundation, certain representatives of the trades were necessarily constituent members of the council, and one of these members was specially nominated by the statutes, to convene with certain other governors, in discharging some important trusts, such as auditing the accounts, and keeping the common seal of the hospital,—it was held, that a share in the governorship was not bestowed upon the representatives of the trades, except in their character of members of the town-council for the time being, and that as they were deprived of that character, by the burgh reform act of 1833,¹ they had no longer a right to be governors.²

*When custom
only rule.*

Where the terms of an ancient foundation or mortification are unknown, the practice in voting on former occasions is of course the only rule.³

¹ 3 and 4 W. 4 c. 76.

² Trades of Edin. 3d June, 1836, 14 S. 873.

³ Halden, 22d July, 1707, M. 2387; Lealie, 9th June, 1814, F.

CHAPTER III.

NATURE OF THE OFFICE OF TRUSTEE, AND POSITION OF THE PARTY APPOINTED.

As the duties of a trustee, and liabilities attending that office, may be incurred although the party be not invested in the estate, before formally accepting of the office of trustee, or doing any act from which acceptance may be inferred, the party requested to accept of the office, or appointed by deed of settlement, ought carefully to inquire into, and maturely consider, the nature and amount, first, of the debts; secondly, of the estate to meet these debts; third, of the duties to be performed; and lastly, the powers or authorities given,—all of which separately, are matters of serious importance, either as duties to be fulfilled, or as liabilities to be incurred, and the means and sufficiency of relief. These duties vary in nature and extent, in each individual case; and what to one individual may, from habits of business or local opportunity, be matter of slight moment or consideration, to another may be the source of difficulty and anxiety; and this of course applies equally to liability, which, moreover, may arise from causes wholly unforeseen, and therefore unprovided for. But much, and indeed it may be said all, of these difficulties may be provided for, or avoided, by proper steps and precautions being taken at the

Measures to
be adopted
with a view to
acceptance.

Inquiries to
be made.

Qualifications
of individuals
appointed.

period of acceptance; strict attention to instructions during the course of administration will attain the rest.

A gratuitous office.

The office of trustee is purely a gratuitous one; so much so, that a trustee in an extrajudicial settlement of a bankrupt estate, though a law agent, or otherwise, is not entitled to demand any fee or reward.¹

Trustees appointed; executors, and tutors and curators.

Parties who are appointed trustees are also invariably appointed executors, and very frequently tutors and curators for beneficiaries who are minors. Their holding the office of trustee does not in any way relieve them from their duties in such other capacities. Thus, they must be confirmed executors, and make up inventories as guardians, in terms of the statute 1672, c. 2. Practically, the offices of trustee and tutor and curator are in these circumstances combined.² If a testator dispone his whole property, heritable and moveable, to a trustee for specified purposes, but without expressly appointing the trustee to be executor, it would seem that such trustee is entitled to be preferred to the office of executor, in competition with the next of kin of the testator.³

Trustee preferable to next of kin as executor.

Where a father deceased had named trustees to administer an annuity for behoof of a fatuous son, the Court, on their application, appointed them, and the survivors or survivor of them, *curators bonis* to the fatuous son, although it is unusual to

¹ Johnston's Trustees, 4th Jan. 1738, M. 13407; see also *inf. part 5.* A party who is employed to wind up the affairs of a banking company, but on whom such authority is not conferred as to entitle him to be invested with the property, is a manager, and not a trustee. See Paul, &c. 13th May, 1828, 4 S. 572.

² See Thomson, 16th June, 1812, F.; Mollison, 19th December, 1833, 12 S. 237.

³ See Kinninmond, 27th July, 1737, M. 3816.

Appointment of trustees as curators bonis.

Insanity of beneficiary.

appoint more than one to the office of *curator bonis*.¹ Where a Scottish peer resident abroad became insane, the Court appointed a *curator bonis*, with the usual powers, notwithstanding the subsistence of a trust-deed for behoof of his creditors, it being observed, that such appointment did not prejudge any question either as to the validity of the trust-deed, or the rights created.² Although trustees have no power over the person of any beneficiary, they may apply to have illegitimate children removed from the custody of the mother, and their maintenance and education provided for by order of the Court; but only in the case of personal objection to the mother, apart from the fact of maternity.³

Illegitimate
children.

The effect of a trust, when properly constituted, is to create a positive vested right of property in the trustee,⁴ for the purposes of the trust alone, the trust-estate being wholly free from liability for the personal debts of the trustee.⁵ Where special powers are given to a trustee of doing certain acts, as he holds the proprietary right, securities granted, or sales made, are as effectual as those of an actual proprietor possessing the beneficial right; so that, in such circumstances, a purchaser from the trustee would not be bound to see to the application of the price; and though a sum of money borrowed should be misapplied, such would not affect the security given.⁶

Special
nature of
the title in
trustees.

As regards their character in law, trustees are

Legal char-
acter of trus-
tees. Are
singular
successors.

¹ Kirk, 21st May, 1836, 14 S. 814.

² Dalrymple, 25th June, 1836, 145, 1011.

³ See Trustees of Dr Hunter, 2d Dec. 1820, F.; Speid, &c. 18th Dec. 1821, 1 S. 221; Trustees of Dr Hunter, 28th May, 1825, F. and 4 S. 42; Baxter, 5th July, 1825, 4 S. 189.

⁴ Dalrymple's Trustees, 18th May, 1825, 4 S. 16.

⁵ See Mackenzie, 5th Feb. 1678, M. 10188.

⁶ Dewar, 4th Dec. 1792; Bell's Cases, 541. See, however, *infra* part 2, c. 7.

singular successors, coming in place of their author, according to the nature and amount of the property conveyed. Thus, the trust-disponees of a deceased vassal, to whom an estate has been disposed in trust for the heir, whom failing, to strangers, are not entitled to demand an entry from the superior, without paying the casualties of superiority as singular successors.¹

But where an incorporation was appointed trustees, the superior was held not bound to enter it as his vassal.² So again, where, during the dependence of an action of declarator of right to an estate which was ready for judgment, the defender died, having disposed the estate to trustees—and the action having been transferred against the trustee's son, who refused to enter as heir, or to defend,—a judgment, which was given for the pursuer, was held not to constitute *res judicata*, as to the trustees.³ As regards individual representation, however, there may be a distinction. Thus, where it was pro-

vided in a contract of lease of a mansion-house, and other subjects granted by a trustee for creditors, that there should be, at a certain term, a break, optional to the proprietors, which option should be exercised in the event only of his resolving to enter himself into the natural possession,—it was held, that this option could not be exercised by the trustee's determining to enter personally to the natural possession of the premises.⁴ So also, where a father conveyed all his moveable funds and unentailed property to trustees, with directions to vest the money in land, and entail the whole on a certain series of heirs—and with power to give or

Casualties
due by them
to superiors.

Case of an
incorporation

Character of
trustees as
parties to
actions.

Individual
representa-
tion by.
Under a lease.

¹ Grindlay, 18th Jan. 1810, F.

² Hill, 17th Jan. 1815, F.

³ Goldie, 28th Nov. 1752, M. 14065.

⁴ Davidson, 7th June, 1838, 16 S. 1125.

withhold possession from his only son, according as they were satisfied with his conduct—and the son, after his father's death, raised an action against the trustees for a half of his father's moveable estate as *legitim*, but afterwards renounced this claim under an arrangement with them, whereby they put him in possession of the trust-estate,—it was held, in a question with his creditors after his death in a state of insolvency, that the trustees were not conjunct and confident persons in the meaning of the act 1621, so as to warrant reduction under it.¹

Whether
conjunct and
confident
persons.

As regards the heir of the trustee, contracts by trustees with him for behoof of the trust-estate, are as effectual as with other parties—he being presumed to know the terms of the trust-deed. Thus, where an heir acknowledged the right of trustees to a lease, as falling under a general conveyance to them, by possessing the farm for several years on a missive from them,—he was held not entitled to claim the lease in his character of heir.²

Contracts by
trustees with
heir of trustee.

Whatever reservations or conditions may be annexed to a trust, these can never, unless so specially provided, be interpreted as giving a personal interest to the trustee.³ As, for instance, where a sum appointed to be lent out on security, in liferent to a legatee, was at that party's death to be payable to the trustees,—it was held, that there was no bequest to the trustees individually, but that the sum was to merge in the general fund of the trust-estate.⁴ And therefore, in accounting, a trustee

Personal
Interest of
trustee.

Terms of
special
bequest.

Obligation to
account.

¹ Young, 23d Jan. 1835, 18 S. 305.

² Monro, 17th Dec. 1825, 4 S. 328.

³ Sinclair, 6th Jan. 1708, M. 16186.

⁴ Millar, 14th July, 1837, 2 S. M. 866.

can retain no funds placed in his hands, otherwise than for the purposes of the trust, or his own relief;¹ and must account for all ameliorations and accumulated profits.²

Instance of
the effect of
this rule.

The case of *Macfarlane v. Cranstoun*,³ shews the practical effect of this rule. In that case, a party having been appointed trustee to distribute the funds of another among his creditors, first one, and then a second process of multiplepoinding was raised to wind up the business. Certain creditors lodged claims for dividends effeiring to their debts, while others neglecting to appear, there remained a surplus of the fund *in medio* not distributed. The Lord Ordinary held, that this fund must remain in possession of the trustee, to be paid to the absent creditors when they should come forward. But the Court recalled that judgment, and directed (after advertisements) that the remainder of the fund *in medio* should be distributed among those who had claimed in the action, towards farther liquidation of their claims. The result of that arrangement necessarily was,—first, That the trustee was divested of the fund, and care taken that he should not, by any contingency, derive profit from the trust in conse-

¹ *Maxwell*, 15th Nov. 1667, M. 16166; *Soutar*, 22d Jan. 1801, M. Implied Will, App. No. 2.

² So in England, the trustee must also account to the cestuique trust for the meane rents and profits which he has received from the estate. *Giddings v. Giddings*, 3 Russ. 241; *Keech v. Sandford*, Sel. Ch. Ca. 61; *Mulvany v. Dillon*, 1 B. and B. 409; *Walley v. Walley*, 1 Vern. 484; *Lucken v. Rushworth*, Finch. 392; *Blewet v. Millet*, 7 B. P. C. 367. And the general rule is, that they shall not derive any emolument from the administration of the property committed to their charge. *Burgess v. Wheate*, 1 Ed. 226, per Lord Mansfield; *Id.* 251, per Lord Henley; *O'Herlihy v. Hedges*, Sch. and Lef. 126, per Lord Redesdale; *ex parte Andrews*, 2 Rose, 412, per Sir J. Plumer; *Middleton v. Spicer*, 1 B. C. C. 205, per Lord Thurlow; *Docker v. Somes*, 2 M. and K. 664, per Lord Brougham.

³ 12th Dec. 1323, 2 S. 578.

quence of creditors permanently neglecting to come forward—he merely became entitled to his discharge; and secondly, That while those creditors, notwithstanding regular citations and newspaper advertisements, had neglected to appear and claim, would thereafter have no other remedy than the very inconvenient or imperfect one of proceeding against those creditors who had appeared, and obtained more than their due proportion of the fund. So strictly is the office a ministerial one, that the trustee cannot derive ultimate benefit from the estate, even although the testator should have no legal heirs, and the trustee be named executor, for it will go to the Crown as *ultimus hæres*, in preference to him—he being executor *qua* trustee only.¹

Office strictly
administra-
tive.

¹ Finnie, 30th Nov. 1836, 15 S. 165 ; Torrie, 31st May, 1832, 10 S. 597. This is not the case by the law of England. By it, such an interest may arise to trustees in the case of heritage—not from any positive right in the trustee himself, but from the want of right in any other. For as no person remains to sue a sub-poena, the trustee must, as the legal proprietor, enter upon the beneficial enjoyment himself. Burgess *v.* Wheate, 1 Ed. 177, per Sir T. Clarke ; Attorney-General *v.* Sands, Hard. 496, and Cary, 14, per Lord Hale. The question was raised in Burgess *v.* Wheate, *ut sup.* 185, as to whether the right to the estate might not, in particular cases, result to the creator of the trust ; but was not decided. But this interest arises to the trustee from the circumstance of the jurisdiction being divided in England. Thus, as the trustee in these cases advances not a positive, but merely a negative claim, he has no ground for coming into a Court of Equity for the establishment of his right. Burgess, *ut sup.* 212 ; Williams *v.* Lord Lonsdale, 3 Ves. 752, per Lord Loughborough. But as courts of law have no cognizance of any but legal rights, a mandamus may apparently be issued from the Queen's Bench for compelling the admission even of a bare trustee. See King *v.* Coggan, 6 East. 431, S. C. 2, Smith, 417 ; King *v.* Wilson, 10 B. and C. 80. If the cestuique trust of chattels, real and personal, die without leaving any next of kin, and intestate, Jones *v.* Goodchild, 3 P. and W. 33 ; Rutherford *v.* Maule, 4 Hagg, 213 — or has appointed an executor who, by the language of the will, is excluded from any beneficial interest, Middleton *v.* Spicer, 1 B. C. C. 201 ; and see Barclay *v.* Russel, 3 Ves. 424 ; Henchman *v.* Attorney-General, 2 S. and S. 498, S. C. 3 M. and K. 485 ; Cave *v.* Roberts, 8 Sim. 214, — the beneficial interest will not remain with the trustee, but go to the king.

Right in trustee independent of trust.

Special allowance in virtue of office.

**Special legacy.
Where appointed residuary legatee.**

**Heir-at-law.
Claim previously constituted.**

Exception where trustee also a creditor.

The trustee may competently have a right or interest in the estate, independently of the trust, as where an estate is conveyed to a party in liferent, with directions to convey the fee to a certain individual, or certain individuals, or for a certain purpose. But the only circumstances in which personal benefit can arise to the trustee, in connection with the trust-office, is where special allowances are granted by the trust-deed, as a compensation, in some degree, for the duties and trouble incurred in the administration ; or unless a special sum, in the nature of a legacy, shall be conveyed under a *mortis causa* deed of appointment ; or if a right to the residue be conveyed under the deed of appointment, in which case the trustee comes to be in the position of a residuary legatee, and must act as such ; or unless he be heir-at-law ; or have a claim previously constituted on the trust-estate, as in the case of an eldest son having a share of an heritable debt burdening his father's property, who accepts a conveyance to the property as *ex facie* absolute, but really as trustee for all having interest, for in that case his own share of the property is not thereby extinguished *confusione*.¹ The exclusion of interest in the estate on the part of the trustee, does not apply to the case of a trustee who is also a creditor ; in which case his right as creditor is totally distinct from his trust character—his right as creditor being the same as that of any other creditor on the estate.²

See Lewin on Trusts, 260, &c. It need scarcely be observed, that with us the beneficial interest, in all gratuitous trusts at least, would revert to the trustee in preference to the crown, the trust-conveyance being simply at an end.

¹ Telford, 12th May, 1835, 13 S. 735.

² See Hamilton, 21st July, 1670, M. 70 ; Home, *inf.* page 115.

The acceptance of a trust, and acting as trustee, may, however, be an important element, as inferring homologation, to the exclusion of a claim of *legitim* by a trustee.¹

Upon this principle, that as regards the individual interests of the party appointed, the trust is a mere obligation on the trustee to administer the trust-estate, arises the rule of law, that trustees must communicate easies, that is, make available to the trust-estate, relief, of whatever kind, arising during the course of administration.² This rule of law is in effect a restriction or disqualification arising from the office of trustee, and affects the personal interests of the trustee, in so far as competing or conflicting with the interest of the trust-estate. The law looks with a watchful eye to the interest of the trust-estate ; and where any benefit arises to the trustee which ought to have been communicated by him to the estate, or which might have been so, it is held, that the act of the trustee, in obtaining that benefit, was done in contemplation of the trust ; and that, therefore, the trust-estate is to be preferred.³ The restrictions to the trustee's acting on his own behalf are very im-

Plea of homologation against trustee.

Trustee must communicate easies.

¹ See Carmichael, 8th Feb. 1823, 2 S. 198.

² See Stewart, 25th Feb. 1749, M. 6881 ; Campbell, 15th Feb. 1783. M. 12461. The English law distinguishes such ameliorations as constructive trusts. For a constructive trust is raised by a court of equity wherever a person, clothed with a fiduciary character, gains some personal advantage, by availing himself of his situation as trustee ; for as it is impossible a trustee should be allowed to make profit by his office, it follows, that so soon as the advantage in question is shewn to have been acquired through the medium of the trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his cestuique trust. See Lewin on Trusts, 170, &c.

³ Thus, in English law, if trust-money be laid out by a trustee, in buying and selling lands, in stock speculations, in commercial adventure, as in buying

Trustee must not place his personal interest in competition with that of the trust-estate.
Rule as to purchases.

Of debts due by trust-estate.

Debts incurred during subsistence of trust.

portant; for where a trustee buys up a right which might compete with the right in which he is trustee, the right so purchased cannot, in his hands, prejudice the trust-estate, and he is bound to communicate to the estate the benefits thereby accruing, deducting the sum disbursed by him, with interest thereon, where obtained by means other than those appertaining to the trust-estate.¹ Thus, where a party, who was debtor beyond the value of his effects, conveyed his whole property to trustees for behoof of his creditors, and for a length of time relinquished all thought of redeeming his estate; but subsequently, the value of the estate having run so high as to give a hope of reversion, brought a process to redeem it, the trustee who had come into personal possession of some of the debts, was held bound to communicate to the trustee the easements got in compounding the debts acquired by him, although the trustee did not undertake to prove that these debts were purchased by commission from the creditors, or that any share of the common fund or annual produce of the estate was applied for purchasing them.² So, also, where a trustee for creditors, during the subsistence of the trust, acquires right to a subsequent debt contracted by the insolvent, he does so for the trust, and must

or fitting out a vessel for a voyage, or putting it in the trade of another person, from which he is to derive certain stipulated gains, or employ it himself for the purposes of his own business,—in all these cases, though any loss must fall exclusively upon himself, he must account to the trust-estate for the whole profit. *Baldwin v. Banister*, cited *Robinson v. Pett*, 3 P. W. 251, note (A); *Fosbrooke v. Balguy*, 1 M. and K. 226; *Norris v. Neve*, 3 Atk. 37; *Docker v. Somea*, 2 M. and K. 664, 665, per Lord Brougham.

¹ *Hamilton*, 1 Bell's Ap. Ca. 574; *Rev. Do.* 8th March, 1839, 1 D. 668.

² *Earl of Crawford*, 6th March, 1767, M. 16208.

communicate to it all the benefit of the acquisition.¹ On the same principle, under the provisions of the act 1621, regarding conveyances to conjunct and confident persons, whereby they must prove that value was given, where a second son accepted from his father a tack of the family estates for payment of debts, and having afterwards obtained from his elder brother a disposition of that estate, in an action at the instance of the son of this eldest brother, whom the Court found to have been served heir-male, the trustee was held bound to count and clear the onerous cause of the disposition,² that is, to shew that the debts or other sums paid by him were a sufficient price for the estates. In certain cases, eases are presumed against the trustee, as where conveyances bear, in general terms, certain sums of money, without adding equal to the sums after assigned. These presumed eases are rated at a medium of the eases proved to have been given of debts equally preferable.³

The rule of law, as to the communication of eases, is carried out against the trustee, even in regard to a right vested in himself; in which case he is bound to transact his own claim on precisely the same footing as he has transacted the claims of others against the

Objection of
conjunct and
confident.

When eases
presumed.

Application
of rule as to
eases to per-
sonal claims
of trustee.

¹ Hamilton, *ut sup.*; see also cases of Rae, 21st Feb. 1673, M. 16170; Earl of Northeik, 21st Feb. 1702, B. Sup. 4, 529; Wright, 24th June, 1712, M. 16193; Ogilvie, Feb. 1729, M. 16200. So also in England, if a trustee buy in any debt or incumbrance, to which the trust-estate is liable, for a less sum than is actually due thereon, he will not be allowed to take the benefit to himself, but the benefit will go to the estate, or the party entitled to the surplus. *Robinson v. Pott*, 3 P. W. 251, note (A); *Darcy v. Hall*, 1 Vern. 49; *ex parte Lacey*, 6 Ves. 628, per Lord Eldon; *Morret v. Paske*, 2 Atk. 54, per Lord Hardwicke; *Anon. Ca. 1 Salk.* 155; *Carter v. Horne*, 1 Eq. Ca. Ab. 7; *Dunch v. Kent*, 1 Vern. 260.

² *Home*, 27th May, 1712, R. Ap. Ca. 47.

³ *3 Chalmers*, 20th Feb. 1735, Elech. Trust, 3.

estate; for where he stipulates for eases in administering the estate, he must submit to the loss where it affects his own personal interest.¹ And where funds are put into the hands of a party in trust for the execution of certain purposes, the trustee cannot apply them to the relief of debts due to himself.² Thus, where a discharge of a bond due to a wife was signed by her husband and her, and put into the hands of the wife's brother, at whose instance execution was provided to pass against the husband, and by whose consent, the wife's liferent was to be secured, and the brother applied part of the money to the payment of a debt due by the husband to him, he was found liable to the wife for her liferent interest.³ And being of the nature of a *depositum*, or strict obligation, trust admits of no compensation.⁴ These are principles applicable to trusts generally, whether by deed or otherwise, as the act of acceptance precludes the personal interest of the trustee from interfering in any way with the application of the property to the purposes of the trust.

No compensation
in trusts.

These prin-
ciples of
general
application.

Purchase of
trust-estate
by a trustee
for himself or
another.

The principle which prevents the trustee from deriving personal benefit from the trust-property, or doing any thing to place his own interest in competition with that of the trust, also prevents him from purchasing the trust-property for himself or another. The necessity of this restriction is apparent, as much injustice might arise to the estate, from the circumstance, that the trustee has opportunities of dis-

¹ Anderson, 21st Nov. 1740; Elch. Trust, 10; Swinton's Ap. No. 183, p. 44; Scot, 23d Feb. 1697, M. 2628.

² Campbell, 11th Dec. 1781, M. 2665.

³ Osburn, 8th Dec. 1714, M. 16195.

⁴ Craig, 6th Dec. 1677, M. 16174; Hay, 22d Dec. 1825, 4 S. 344. See also Scott, 20th Jan. 1885, 13 S. 278; Menzies, 22d June, 1826, 4 S. 747.

covering the value of the trust-property which are not open to the public, or may be withheld; and were his own interest in any degree to interfere, there could be no possibility of ascertaining it.¹ It has been held, that where trustees possess property under an heritable bond, and expose it to sale by ^{Sale by auction.} roup, it is competent for them to purchase it for behoof of the trust-estate.² But this can hardly be taken as a precedent, as the trustees were there acting as buyers and sellers, which in no circumstances would now be held competent. The restriction properly applies to all concerned with such sales, whether as trustees, agents, managers, or others. Thus, it was held a very doubtful question, whether the husband of one of the parties to an action for bringing to sale a landed property, in the price of which the party was interested as beneficiary, was not disqualified from purchasing the property.³ This principle has been introduced into our law from that of England, by the case of the York Buildings Company *v.* Mackenzie, as reversed on appeal.⁴

<sup>General rule.
Borrowed
from law of
England.</sup>

¹ Hamilton, 1 Bell's Ap. Ca. 574; Rev. do. 8th March, 1839, 12 S. 668.

² Maxwell, 21st Jan. 1823, 2 S. 180.

³ Darling, 8th Dec. 1838, 1 D. 213.

⁴ 8th March, 1793, M. 16212, and 13367; reversed 13th May, 1793, 8 Brown's P. Ca. 42; see also 4 Dow. 380; and Smith, 10th Feb. 1826, 4 S. 442; Drew, 2d Dec. 1825, do. 259; Jeffrey, 16th June, 1826, do. 722; Browning, 28th May, 1837, 15 S. 999; M'Kellar, 8th March, 1817, F.; but see Drysdale, 28th Jan. 1835, 13 S. 348. A number of practical questions illustrative of this subject have occurred in England; the general rule being, that a trustee for sale is disqualified from purchasing the trust-property, of whatever kind, and in whatever capacity he may do so, Fox *v.* Mackreth, 2 B. C. C. 400, and 2 Cox. 320; Aff. in D. P. 4 B. P. C. 258, &c. as explained in Gibson *v.* Joyls, 6 Ves. 277; *ex parte* Lacey, Id. 627; *ex parte* James, 8 Ves. 353; Eales *v.* Trecothick, 9 Ves. 247; *ex parte* Bennet, 10 Ves. 394; Crowe *v.* Ballard, 2 Cox, 253, and 3 B. C. C. 117; Killick *v.* Flexney, 4 B. C. C. 161; Hall *v.* Hallet, 1 Cox, 184; Whatton *v.* Toone, 5 Mad. 54, 6 Mad. 153; Price *v.* Byrn, cited Campbell *v.* Walker, 5 Ves. 681, and 13 Ves. 601; Randall *v.* Errington, 10 Ves. 423; Baker *v.* Carter, 1 Young and

Trustee where
bound to act,
bound to
concur.

Actions in
name of.

Where it is the duty of a trustee to perform an act, he is not entitled to object to another party interested using his name, in order to accomplish that which it is his duty to attain. Thus, when, for the purpose of making up a title to an estate, a party

Coll. 250; *ex parte* Bennet, 10 Ves. 381; Whelpdale v. Cookson, 1 Ves. 9; *ex parte* Hughs, 6 Ves. 617; *ex parte* Lacey, Id. 625; Lister v. Lister, Id. 631; Whichcote v. Lawrence, 3 Ves. 740; Attorney-General v. Lord Dudley, Coop. 146; Downes v. Grazebrook, 3 Mer. 200; Hall v. Noyes, cited Whichcote, *ut sup.*; and see Morse v. Royal, 12 Ves. 374; Mulvany v. Dillon, 1 B. and B. 409; Owen v. Foulkes, cited in Lacey, *ut sup.* 630, note b; Randall v. Errington, 10 Ves. 423; Kilbee v. Sneyd, 2 Moll. 186; Parkes v. White, 11 Ves. 226; *ex parte* Badcock, 1 Mont. and Mac. 239; Sanderson v. Walker, 13 Ves. 601; Ayliff v. Murray, 2 Atk. 59; Sug. Vend. and Purch. p. 569. Nor can he purchase as agent for a third party, *ex parte* Bennet, 10 Ves. 381, 400; Coles v. Trecothick, 9 Ves. 248, per Lord Eldon; and see Gregory v. Gregory, Coop. 204. But there is no objection to a purchase by a party named as trustee, but who has disclaimed without accepting, Stacey v. Elph. 1 M. and K. 195; and see Chambers v. Waters, 3 Sim. 42. It is also not illegal for the trustee to purchase from the cestuique trust, after the relation of trustee and cestuique trust is dissolved; but this is looked upon with much jealousy in the law of England, and ought by no means to be encouraged in Scotland. See cases *ut sup.*; and Lewin on Trusts, 363, 364, &c. But where the cestuique trust took the whole management of the sale himself, it was held competent for the trustee to purchase; Coles, *ut sup.* 234, per Lord Eldon. So, also, where the cestuique trust had urged the purchase; Morse, *ut sup.* 355; and where he purchased it from the cestuique trust, after in vain endeavouring to dispose of it otherwise; Clarke v. Swaile, 2 Ed. 134, per Lord Northington; but these are by no means general rules. Where the cestuique trust are creditors, their unanimous consent is necessary; see Sir G. Colebrook's case, cited *ex parte* Hughs, 6 Ves. 622; *ex parte* Lacey, Id. 628; and cases cited, Id. 630, note b; Whelpdale v. Cookson, cited Campbell, v. Walker, 5 Ves. 682, overruled; and see Lewin on Trusts, 365; and the Court will not authorize the trustee to bid; see *ex parte* James, 8 Ves. 352; Anon. case, 2 Russ. 350; *ex parte* Bage, 4 Mad. 459. As to this subject generally, see Lewin on Trusts, c. 15, s. 3. But this rule, as to trustees not purchasing, is not so clear as to trustees other than those appointed for the purpose of selling the trust-property; see Parkes v. White, 11 Ves. 226; Randall v. Errington, 10 Ves. 426; Ayliff v. Murray, 2 Atk. 59; Davidson v. Gardner, cited in Sugden's Vend. and Purch. 603, 8th ed. The application of the law of England to this subject has, however, been considered, on appeal to the House of Lords, in the case of Hamilton, *sup.*, by which it may be held as established, that a trustee can, under no circumstances, purchase trust-property for his own behoof. It being observed, by Lord Brougham, that in *ex parte* Lacey, 6 Ves. 625, and *ex parte* Jones, 8 Ves. 328, Lord Eldon denied the doctrine supposed to have been delivered by Lord Loughborough in

has granted a bond in favour of a person who grants a declaration of trust, the granter of the bond may insist in the requisite action of adjudication in name of the trustee, who is not entitled to object.¹ And where a trustee has been employed to divide a fund among creditors, he is not entitled to object to the raising of a process of multiplepoinding in his name, convening the creditors to produce and adjust their claims. It may also be raised by a purchaser in whose hands arrestment has been laid, in order to ascertain to whom he is to pay the price, and that he may obtain a discharge;² or by executors or others, to ascertain whether trust-funds are heritable or moveable.³ This rule is applicable generally to all cases in which various parties have an interest.

General application of rule.

He is held in law to be so far a trustee for their behoof, that not only he himself may convene the claimants, and demand exoneration by a process of multiplepoinding; but any party interested in the fund may raise the process in the name of the holder of it, which proceeding he cannot successfully resist, when in proper form.⁴ But for such an action to be competent, it is necessary that there shall be double

When multiplepoinding competent.

Whichcote v. Lawrence, 3 Ves. 740, that a trustee must make some advantage of his purchase before it can be set aside, because in ninety-nine cases out of every hundred, he held that it might be impossible for the Court to examine into this matter. Upon the same principle, trustees cannot lease to one of themselves; *ex parte Hughes*, 6 Ves. 617; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, 500.

¹ *Ruthven*, 19th Feb. 1663, M. 16164. So, also, in England, the cestuique trust, having in general no alternative, must bring his action in name of the trustee, who must be indemnified against the costs. *Shine v. Gough*, 1 B. A. B. 445.

² *Reid*, 21st June, 1623, 2 S. 414.

³ *M'Intyre's Trustees*, 21st May, 1829, 7 S. 636; *Dick*, 4th July, 1828, 6 S. 1065.

⁴ *Dixon*, 5th March, 1833, 11 S. 517.

distress ; and that the real raisers shall not, for instance, set forth statements importing, that in the case of a trust of copartnery property, the trustees have wrongfully intromitted with the estates of the individual partners ; or that they have committed illegal acts in the management of the trust ; or that the real raisers are creditors of the individuals, and not of the partnership ; or where the fund consists of the estate of individuals, if no diligence has been done to attach the estates.¹ So, also, where an arrestment has been executed in the hands of a trustee for creditors, as being debtor to the truster *privato nomine*, a multiplepoinding brought in his name *qua* trustee, was held incompetent.² Recourse is very generally had to this process in name of trustees, executors, and debtors of insolvent parties. It is also resorted to by trustees in cases where a difficulty arises as to how, in winding up the trust, they are to pay or invest the residue, so as to give effect to the provisions of the truster.³ So, likewise, where trustees under a deed of settlement were directed to pay off debts, and invest the residue of moveable funds in lands within two years of the testator's decease, they were held entitled to bring a multiplepoinding *quoad* the moveable estate, though not actually subject to double distress, and though a reduction of heritage, also conveyed, had been brought by the heir-at-law.⁴ It is also resorted to by trustees not choosing to exercise discretionary powers.⁵ It is absolutely necessary, in many cases,

¹ Ronaldson, 11th Dec. 1834, 13 S. 180.

² Thomson, 11th Feb. 1826, 4 S. 450.

³ Anderson, 11th Feb. 1835, 13 S. 450.

⁴ M'Dougall's Trustees, 9th July, 1830, 8 S. 1036.

⁵ Thomson, 16th Nov. 1814, F.

that trustees should resort to this process;¹ as, for instance, where the beneficiary is presumed, though not proved, to be dead.² But on the other hand, trustees must act on their own responsibility, and are not entitled to resort to this process for the purpose of asking the advice of the Court as to whether they are in safety in adopting certain measures.³ Where a party conveyed his estate in trust for behoof of his creditors—and the estate was realized, and the proceeds, with the exception of a small balance, divided among the creditors, none of whom made any objection—and one of the trustees, founded on alleged irregularities in the management of the trust-estate, thereafter raised a process of multiplepoinding and exoneration,—it was held, that as there was no double distress or conflicting statements, the process was incompetent and unnecessary.⁴ Where there is no proper fund *in medio*, but only one *in spe*, declarator, not multiplepoinding, is the proper process.⁵

Under the law of Scotland, a litigant never loses the right to prove the facts of his case by the oath of his antagonist, providing he will consent to abide by the state of facts sworn to. Even after a party has lost his cause by the decree of a court, or the verdict of a jury relying on certain facts as proved, he may still, by the effect of a reference to the oath of his antagonist, obtain the whole to be

Trustees must
act on their
own responsi-
bility.

Proof of
claims against
trust-estate
by oath of
trustee.

¹ Scougal, 28th March, 1621, M. 3863; Duff, 8th March, 1631, M. 3869. See also Duties of Trustees in Paying Debts, *inf.* part 2, c. 5.

² Campbell, 17th June, 1824, 8 S. 145.

³ Gregorson, 14th Feb. 1842, 4 D. 678.

⁴ Home, 18th Nov. 1833, 4 S. 24.

⁵ See Provan, 14th Jan. 1840, 2 D. 298. See also Hutton's Trustees, 23d May, 1834, 12 S. 634.

Legal distinction. reversed. The case of a trustee is peculiar. On the one hand, a trustee being a proprietor, his oath ought to bind the estate ; but being only vested on behalf of others, there is no reason why he should be regarded as more than an ordinary witness. The law has made a reasonable distinction. In all transactions conducted by the trustee personally, a reference of the facts to his oath is competent, and conclusive for or against the estate ; and the same rule obtains to the extent of any interest he may have in the trust-funds or property. In other respects, in relation to the acts of his author, or rather extrinsic affairs, a trustee is to be regarded as an ordinary witness, and his testimony is competent, or otherwise, as in cases of parole proof generally. Hence, in the case of an executor, the oath of the executor was held competent to fix a debt against the estate to the extent of the executor's interest in it, but not to affect the interests of heirs (in moveables) or creditors.¹ Thus, also, in a reference to the oath of a body of road trustees, it was held incompetent to examine one of their number in relation to facts not known to him as a trustee, but of which he had become cognizant when acting as a surveyor before he was appointed a trustee.² But this rule will not hold where the trustee is also a party personally interested, as an heir.³ Anomalous cases, however, occur. Thus, where a bill had undergone the sexennial prescription, and one of the trustees, who was a debtor in the bill, had

¹ Dixon, 5th July, 1631, 3 B. Sup. 407.

² Hotsom, 16th Nov. 1833, 12 S. 57. See also Stewart, 12th Dec. 1815, F.

³ See Nisbet's Trustees, 23d Jan. 1829, 7 S. 307.

allowed decree in absence to pass against him, thereby admitting the debt to remain due—and the name of the deceased trustee also stood on the bill as a party liable in payment to the holder—and to endeavour to fix the debt against the trust-estate, a reference was made to the oaths of the trustees—the court, with the exception of the individuals against whom decree in absence had been pronounced, sustained the reference, reserving all questions as to the effect of the oath or oaths when taken.¹ This decision reverses no ancient and established principle, but it is difficult to foresee all the effects of it in practice, in consequence of the unusual proceeding of admitting references to oath, without holding the result to be conclusive as to the statement of facts sworn to.

In an action of reduction of a trust-deed on the head of deathbed, warrant being craved to examine one of the trustees, who was of great age, that his deposition might lie *in retentis*, warrant was granted, upon condition that a regular discharge, freeing the trustee of all consequences of the action, should be produced before the examination took place.² In conducting the administration of trusts, notwithstanding the rules of restriction or limitation by which they are, to a certain degree, subjected, (which are hereafter to be considered,) trustees are entitled to full protection against the importunities and interference of beneficiaries, creditors, and others, and must not be interfered with unless upon cause shewn.³ They are only liable to be interfered with where they have fallen into serious mismanage-

Conditions of
evidence by
trustee.

Trustees
entitled to
full protection
in the execu-
tion of their
office.

¹ Murray, 2d March, 1827, 5 S. 515.

² Small, &c. 22d Dec. 1821, 1 S. 234.

³ Mylne, &c. 6th March, 1832, 10 S. 430.

ment, neglect, or wilful error,¹ or, under certain limitations, insolvency;² still less, of course, can they be interfered with where there is an express exemption from interfering, or an evident intention to that effect, in the trust-deed.³ And they are entitled to every reasonable indulgence, in point of time, both in conducting the business, and in attaining the ultimate object of the trust. As, for instance, where a non-acceding creditor to a voluntary trust, for behoof of creditors, had not attached the trust-funds by any diligence, nor intimated any interdict of sale, it was held, that the trustees were entitled to sell by auction the trust-estate, without incurring any other responsibility than that of accounting for the trust-funds, although the non-accepting creditor had previously rendered the debtor bankrupt avowedly to reduce the trust-deed, and executed a summons of reduction against the trustees, before the second day of the sale, which lasted a week thereafter.⁴ So ample is his power of administration, that a trustee, with powers of sale, for payment of the truster's debts, has been held not obliged to postpone a sale, on a mere intimation that the truster was to put an end to the trust, in terms of the trust-deed, by relieving him of his obligations; and not obliged to part with the title deeds, to enable the truster to transact a loan, free access being given to them in the hands of the trustee's agent.⁵

¹ See Renton, 22d Nov. 1831, 10 S. 38; Mylne, &c. 6th March, 1832, 10 S. 430; Hay, 7th July, 1838, 16 S. 1273.

² See *sup.* page 94, *et inf.*

³ Tod, 27th May, 1842, 4 D. 1275.

⁴ Stubbs & Co. 24th June, 1826, 7 S. 790; Aitken, 16th May, 1832, 10 S. 535.

⁵ Innes, 18th Dec. 1828, 7 S. 206.

As formerly remarked, the office of trustee is one as to which disqualification does not arise from lapse of time;¹ so the powers of trustees, in regulating the investment and destination of special provisions, as directed by the trust-deed, though, for a length of time, neglected to be exercised, do not necessarily become inoperative.²

Effect of
delay as re-
gards trustees.

¹ Darling, 14th Jan. 1823, 2 S. 607.

² Cowan, 20th Jan. 1837, 15 S. 398.

CHAPTER IV.

POWERS OF TRUSTEES, AND JURISDICTION OF COURTS
OF LAW, IN PRIVATE TRUSTS.

General im-
portance of
principles of
powers.

THE doctrine of the powers of trustees generally, is a subject of much importance, the value of having which reduced to fixed principles, has been fully shewn in the able treatise of Sir Edward Sugden. The consideration of it, as a special subject, is particularly necessary in relation to the present branch of the general subject of trusts; for the determination of the rules as to the powers, or, in other words, the interpretation of intention, in these trusts, properly so called in Scotland, may be regarded as the only proper and comprehensive means of systematically considering and determining, the merits and relation of individual and subsidiary points, arising in regard to them; and, consequently, of the rights, duties, and liabilities of individuals resulting from them.

Distinction
between trusts
and powers.

The first distinction in regard to the powers of trustees to be here mentioned is, that which has been made in the English law between a *trust* and a *power*. A trust is a *direction* to do a certain act; a power is an *authority* to do a certain act, or certain acts, if necessary in certain circumstances, or con-

sidered so in the discretion of the trustee.¹ This general distinction, which is applicable to the law of Scotland, and may very properly be adopted in it, may be illustrated by the supposed case of a trust-conveyance of an estate to a party in liferent, and his heirs and donees in fee, with power and instructions to convey the estate to such individuals, of a certain class, as he shall think fit. In which case, if he neglects to execute the conveyance, the estate will fall to his own heirs and successors, as no one has a better title, or even a title to pursue for implement; or, in other words, according to the law of England, the heirs would have the legal estate, whilst the equitable estate in these lands is unconveyed to any third party. Whereas, if the directions contained in the deed were to convey to a certain definite party, or fixed purpose, as for behoof of a certain existing institution, there would be a right in that party, or for behoof of that institution, to procure the heirs of the liferent donee to fulfil the purposes of the trust, and therefore to convey to them. The former is a power; the latter is a trust, or, in other words, an obligation or duty.²

The special rules and principles applicable to powers, to be here mentioned, comprehend, as far as possible, the whole rules of interpretation of these. And, indeed, the whole subject might be treated in the form of rules of interpretation, and all incidental practical matters as subsidiary to them; but as these branches of the subject require mostly to be specially

¹ See *Gower v. Mainwaring*, 2 Ves. 89; *Cole v. Wade*, 16 Ves. 43; *Godolphin v. Godolphin*, 1 Ves. 23, per Lord Hardwicke; *Brown v. Higgs*, 8 Ves. 570, &c.; see *infra*, part 2, c. 7; and see *Wilm.* 23.

² See *infra*, S. 3, 1, and English authorities there referred to.

considered, and as that course brings out the subject in a more practical form, the better course seems to be, to treat of this as a branch of the present subject of private trusts, the examples or cases mentioned being given as illustrations of the rules and principles.

Different kinds of powers; general, discretionary, and special.

The powers of trustees are either general, discretionary, or special. General powers are such as, by general construction, are held as accessory to, or implied in, the special office as conferred by the trust-deed. Discretionary powers are such as can only be executed by the party specially nominated. Special powers are such as are specially granted by the trust-deed, and are of two kinds, conditional and unconditional.

SECTION I. — GENERAL POWERS.

Nature of general powers. In how far strictly interpreted.

IN so far as regards his general powers, a trustee is merely a depositary who can take none of the profits; and, except in defence or protection of the estate, can exercise no dominion over the substance of it, and therefore he cannot grant feus, which are a species of alienation.¹ And in the special trust, as granted by the deed, the authority is equally limited, except so far as the execution of the duties, in accordance with the express terms of the trust, may invest him with powers of a proprietor. So, far, then powers in trusts are strictly interpreted. But though the general principle by which trusts are regulated

Rule as to conducting general affairs.

¹ In England, the term "other usual powers" has been held not to include a power of granting building leases; *Hill v. Hill*, 6 Sim. 141, per Sir L. Shadwell; and this term does not include the exercise of any power of diminishing the corpus of the settled estate in any way. *Higginson v. Barnaby*, 2 S. and S. 516.

is one of strict interpretation, still, the office, from its nature, implies, that so far as regards the mere conducting of its affairs, judgment and discretion are to be used and acted upon, for its duties are administrative as well as preservative ; were it otherwise, the trust-property must be under the greatest disadvantage, as the sanction of the beneficiary or of the court can in most cases not be obtained, or only at a great sacrifice in point of time, or at an expense totally disproportioned to the occasion : hence arises Duties and powers equivalent. the rule, that what a trustee may be compelled to do by an action, he may legally do without an action,¹ for he must have power to do whatever it is his duty to do. In the law of Scotland, the trustee has the whole estate vested in him, so that the manner of discussing this subject is not what is the amount of his powers ? but what are the limits of his powers ?

Under powers necessary for conducting the affairs What are comprehended under general powers. of trusts, and preservation of the estates, and realizing of their incomes, are usually comprehended general powers. granting leases,² making repairs, cutting timber shewing symptoms of decay,³ doing diligence for

¹ Lee *v.* Brown, 4 Ves. 369 ; Earl of Bath *v.* Bradford, 2 Ves. 590, per Lord Hardwicke ; Cook *v.* Parsons, Pr. Ch. 185 ; Inwood *v.* Twyne, 2 Ed. 153, per Lord Northington ; Terry *v.* Terry, Gilb. 11, per Lord Cowper ; Shaw *v.* Borrer, 1 Keene, 576, per Lord Langdale.

² In England also this is held to be an implied power, as being necessary for the preservation of the estate. F. P. W. 310 ; Woolmore *v.* Burrows, 1 Sim. 518.

³ Waldo *v.* Waldo, 7 Sim. 261, per Sir L. Shadwell ; see Ker, 21st Dec. 1827, 6 S. 270. But a farror of a trust-estate, whose right of possession is excluded during the life of the life-renter, has no right to cut timber ; Tait, 2d Dec. 1825, 4 S. 247 ; as to this subject, see also Dingwall, 14th Dec. 1833, 12 S. 216 ; do. 8th March, 1834, 12 S. 541.

recovery of debts, rents, &c. &c. Accordingly, it is competent for trustees and beneficiaries under the trust, to call any intromittor to account for intromissions with the trust-estate, prior to the appointment of a judicial factor.¹ In trusts for creditors, the trustee may value at a sum certain, claims the precise amount of which cannot at the time be ascertained, and may allot to the creditors corresponding compositions, without regard to what the value may really prove to be ultimately²—the creditors of course having a right to accept of it or not; and, if they choose, may reserve their claims till the final division shall be made.

Trustees can
not delegate
their powers.

In the law of England, as well as of Scotland, a trustee cannot delegate his powers, by the rule of law, *delegatus non delegare potest*.³ In the law of Scotland, the trustee being the absolute proprietor, burdened with the obligation of responsibility which does not affect the general principle of proprietary power as applicable to him, he may employ such

¹ Wood, Small, & Co., 14th Nov. 1831, 12 S. 42.

² Jameson, 15th Feb. 1815, F.

³ In England, the office, being one of personal confidence, cannot be delegated. If the trustee confide the application of the trust-fund to the care of a stranger,—Adams v. Clifton, 1 Russ. 297; Hardwick v. Mynd, 1 Anst. 109, case cited by Sir J. Jekyll, Walker v. Symonds, 3 Sw. 79, note (a); Char. Corp. v. Sutton, 2 Atk. 405; Kilbee v. Sneyd, 2 Moll. 199, per Sir A. Hart; Douglas v. Browne, Mont. 93; *ex parte* Booth, ib. 248; or his attorney; Chambers v. Minchin, 7 Ves. 196, per Lord Eldon; *ex parte* Townsend, 1 Moll. 189,—or even co-trustee, or co-executor, Langford v. Gascoyne, 11 Ves. 333; Harrison v. Graham, 3 Hill's MSS. 239, cited 1 P. W. 241, note (y,) 6th ed.; Davis v. Spurling, 1 R. and M. 66, per Sir J. Leach; Kilbee v. Sneyd, 2 Moll. 200, 212, per Sir A. Hart; Lane v. Wroth, and Stanley v. Darington, cited in Anonymous case, Mo. 36; Marriot v. Kinnersley, Taml. 470; *ex parte* Winnall, 3 D. and C. 22; Anon Mo. 35; Clough v. Bond, 3 M. and Cr. 497, per Lord Cottenham,—he will be personally responsible for any loss that may result.

agents as he thinks fit and necessary, he always being responsible for them, and having therefore the power of removal. He accordingly has the power of appointing factors for the management of the estate, though special powers of doing so be not given in the trust-deed;¹ for in many important cases of trust, it would otherwise be impossible for trustees to conduct the affairs of the trust, which may require such continued attention or skill, as many persons holding the office are unable to bestow. This power is one which ought not to be interfered with, by appointment or nomination of a particular party as factor, or otherwise, in the trust-deed; for sometimes the party whom the trustor wishes to be appointed to an office under the trust, is referred to and nominated by the deed, in which the trustees may be led to concur, as being sanctioned by the trustor, and so in some degree removing the onus of that frequently important appointment from themselves. But, strictly speaking, and as a general rule, the appointment ought to rest entirely with the trustees, as they are answerable for his acts or omissions.² This is the more important, for this reason, that where the factor is nominated and appointed by the deed, he holds that appointment on the same authority that the trustees hold their office, and therefore cannot be removed by them.³ It will therefore be matter of consideration, whether a trustee shall accept of a trust in such circumstances.⁴ They are also entitled

But may
employ fac-
tors, agents,
&c.

¹ Sym, 13th May, 1830, 8 S. 741; Thomson, 16th Feb. 1838, 16 S. 560.

² See *inf.* part 2, c. 8, a. 1.

³ Fulton, 15th Feb. 1831, 9 S. 442.

⁴ In England, the trustees are entitled to have the assistance of agents, at the expense of the estate; as, of a collector of rents; *Davis v. Dendy*, 3 Mad. 170; *Stewart v. Hoare*, 2 B. C. C. 663; and see *Wilkinson v. Wilkinson*, 2

to fulfil their duty, by bargaining with subordinate parties, in order to accomplish the purposes of the trust consistently with the conditions and directions of the deed, in the manner which they consider most desirable, both in regard to expense and efficacy. Thus, where a trust-donation was vested in the corporation of the town-council of a royal burgh, on condition that they were to apply the annual dividends in the support and maintenance, from time to time, of schools in the burgh, taught in the Madras system, the council made an agreement with the several kirk-sessions of the burgh, binding themselves, and their heirs and successors, to pay over the dividends equally among the kirk-sessions; each of whom, on the other hand, became bound annually to lodge with the council a written vidimus, shewing definitely, that the dividend was to be strictly applied in the promotion of the system of education proposed by the donor, and accompanied by an obligation, binding the kirk-session to apply the same accordingly,—it was declared, that so long as each kirk-session did so, and satisfied the town-council that the obligation was carried into practical execution, it should have right to its share of the dividend; but should forfeit such right, on failure to fulfil these conditions. Provision was made for admitting members of the council to the annual examination of the schools, to satisfy themselves of the *bona fide* and legitimate application of the dividend, and that this was done strictly in terms of

S. and S. 237,—a bailiff; Bonithon *v.* Hockmore, 1 Vern. 316; Chambers *v.* Goldwin, 9 Ves. 272, per Lord Eldon,—or an accountant, if there be complicated accounts to adjust and settle; New *v.* Jones, Exch. 9th Aug. 1833, cited 9 Jarm. Prec. 338; Henderson *r.* M'Iver, 3 Mad. 275.

the deed of donation. The town-council of a succeeding year having refused to sanction this agreement,—it was held, that there was no devolution of the trust, but that it was merely a judicious mode of carrying it into practical execution, and that it was a valid contract, binding on the town-council, so long as duly implemented by the kirk-sessions.¹ Here the trustees, by availing themselves of the assistance of local boards already existing, adopted a course probably less expensive, and more effectual, for accomplishing the object in view, than by any other arrangement which could have been adopted, from the difficulty, or perhaps impossibility, of their conducting it by any scheme of general management alone. No doubt, trustees cannot devolve their powers, without having accomplished the objects of the trust, or obtained permission to do so; but there was here plainly no devolution of powers or superintendence, for these were specially and explicitly reserved and retained, as fully as granted, by the deed; and, in fact, continued to be acted upon, so far as necessary, or indeed practicable; for the greatest strictness of superintendence is undoubtedly necessary in all trusts whatsoever. In this case, which illustrates very fully many points connected with the subject, effect is given to the important rule of law, that in trusts vested in corporations, and other public bodies, the lawful resolutions of the body bind their successors in office.

¹ *Forbes*, 21st Feb. 1837, 15 S. 628, Af. M. R. 530.

SECTION II. — DISCRETIONARY POWERS.

Are powers or confidences reposed in the judgment of special individuals. Which they cannot be compelled to exercise. And do not devolve on the Court.

DISCRETIONARY powers are powers properly so called, that is, not imperative, but depending purely on the exercise of sound judgment; which, therefore, trustees cannot be compelled to execute; and which, being wholly identified with, and dependent upon, a *delectus personæ*, the Court will not, in their room, take upon itself to execute. An instance of this appears in the case of *Dick v. Ferguson*,¹ where a settlement of considerable funds had been made by a party to her son and daughter, and the survivor, requiring them to add together the subjects disposed, so as to make up a total of L.6000, to be lent out on landed security, and the yearly interest to be applied towards the education and support of such of the grantor's descendants as should stand in need of it, at the discretion of the trustees. The trustees refused to accept, deeming the deed whimsical and irrational. The Court found, that the trust had lapsed by the non-acceptance of the trustees; and as the deed conferred a discretionary power, refused to exercise that power. So, also, in the case of *Campbell v. Campbells*,² where a party, who was bound in his marriage-contract to secure a certain sum, and the conquest during the marriage, to himself and spouse in conjunct fee and liferent, and to the children of the marriage in fee—by a *mortis causa* deed of settlement, conveyed the whole to his eldest son, under the burden of a certain sum to his younger children, to take effect in the event of their

¹ 22d Jan. 1738, M. 16206, and 7446. ² 22d Dec. 1739, M. 674.

mother agreeing to give up her claim to the liferent of the conquest, and restrict herself to a lesser jointure; otherwise these provisions to be void; in which event certain persons were appointed to name such provisions to the children as they should see convenient — the referees having declined to accept of the trust reposed in them, the question occurred between the heir and the younger children, whether the powers were devolved upon the Court, to determine provisions to the younger children, *secundum arbitrium boni viri?* or if the younger children were to be left to the extraordinary remedy of reducing the testament, upon the claim they had by the marriage-contract? — it was held, that these powers had not devolved upon the Court *tanquam boni viri*. So also in the case of *Ireland v. Glass*.¹ And, where the founder of an hospital appointed certain official persons to interpret the regulations he had made, and some of the offices had been suppressed, so that there did not remain a quorum of the nominees, — the Court held, that it could not execute the power.²

¹ 18th May, 1833, 11 S. 626. See also Cowan, 20th Jan. 1837, 15 S. 398, per Lord Moncrieff; Burnside, 10th June, 1829, 7 S. 735. See also English cases of *Thomas v. Dering*, 1 Keen, 729; *French v. Davidson*, 3 Mad. 396; *Walker v. Walker*, 5 Mad. 424; *Pink v. De Thuissey*, 2 Mad. 157; Duke of Marlborough *v. Lord Godolphin*, 2 Ves. 61; *Bull v. Vardy*, 1 Ves. jun. 270; *Crosseling v. Crosseling*, 2 Cox, 396; *Bax v. Whitbread*, 16 Ves. 26, per Lord Eldon; *Brown v. Higgs*, 5 Ves. 501, per Lord Alvanley, S. C. 8 Ves. 570, per Lord Eldon; *Down v. Worrall*, 1 M. and K. 561; *Meredith v. Heneage*, 1 Sim. 584, per C. B. Wood.

² Merchant Company, and Trades of Edinburgh, 9th Aug. 1765, M. 7448. So strictly is such a power personal to the individual, that by the law of England, if a trustee should delegate it, he is not only answerable for all the mischievous consequences of the delegation, but the exercise of the discretion by the substitute will be void; *Alexander v. Alexander*, 2 Ves. 643; *Bradford v. Belfield*, 2 Sim. 264. But the appointment of an attorney or proxy is not in all cases a delegation of the trust. When the trustee has resolved in his

Principles similar to those of other contracts.

The legal principles applicable to discretionary powers in trusts are precisely similar to those of other contracts. Thus, it was held that a right by deed of agreement to elect to an office with the advice and consent of another, implied a negative; and that an election without the consent in question was ineffectual.¹

Conditional or unconditional.

Conditional are primary and secondary.
Primary conditional special powers.
When they occur.

May affect rights of individuals.

Obligation on trustee, and rights of parties interested.

SPECIAL powers are either conditional or unconditional:—

1. Conditional special powers are of two kinds, primary and secondary. The former are such as are to be exercised only in the occurrence of a certain event, or the purifying of a certain condition. They occur chiefly in the case of trusts where heritage and moveables are conveyed for the purpose of paying debts and legacies, the residue being left to the heir-at-law, power being given to the trustee to sell the heritage, or part of it, if necessary for accomplishing the purposes of the trust. As the acts of the trustee in such cases may materially affect the interests of parties — as, for instance, in regard to the character of a beneficiary's estate, whether heritable or moveable, in relation to his heirs and successors, — the trustee may be bound to sell, or to justify the sale, that is, to shew that it was necessary

own mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence, if he merely execute the deed by attorney, or signify his will by proxy. See *Attorney-General v. Scott*, 1 Ves. 413; and *ex parte Rigby*, 19 Ves. 463; and *Lewin on Trusts*, 236.

¹ Magistrates of Linlithgow, 4th Dec. 1749, M. 2304.

according to circumstances.¹ These, therefore, are in some degree a combination of trust and power; as the trustee has certain latitude allowed him in regard to the sale, whilst at the same time he is bound to accomplish certain purposes by means of it, if necessary. That is to say, he has to provide for a contingency to the best of his power in certain circumstances, and in a certain manner specified; he is not merely told to do a certain thing absolutely, but is allowed a certain latitude or discretion as to the manner of doing so to the greatest advantage.² These correspond with what in the law of England have been termed "Powers in the nature of trusts."³ Of the same nature is a power of appointing new trustees, which, however, is conditional as regards the fact of being performed.

With a view to prevent trusts from falling by the death or failure of trustees, it is usual to insert in trust-deeds a provision that the party named as *sine qua non* — the remaining trustee or trustees, the beneficiary, a corporation, or benevolent institution for whose behoof the trust has been created, the Court of Session, or any individual body or corporation — shall have the power of substituting a new trustee, or new trustees, in place of such as shall die or become disqualified. But such a power is never ^{Never} presumed.

¹ See *inf.* part 2, c. 7.

² See Cathcart, 26th May, 1830, 8 Shaw, 803; Campbell, 14th Jan. 1801, M. App. Adjud. 11. See *inf.* part 3, c. 2, s. 1; part 2, c. 7.

³ See Sugden on Powers, c. 10, s. 6, no. 3; and Burgess v. Wheat, 1 Blackst. 162, per Lord Mansfield; Warneford v. Thomson, 3 Ves. Jun. 513; Hilton v. Kenworthy, 3 East. 553, Co. Litt. 236, a; Garfoot v. Garfoot, 1 Cha. Ca. 35; Gwilliams v. Rowell, Hard. 204; Auby v. Doyl, 1 Cha. Ca. 180, reported in 1 Cha. Rep. 89, nom., Amby v. Gower; and see Witchcot v. Souch, 1 Cha. Rep. 97.

Are a combination of trust and power.

Powers of substituting additional trustees, and new trustees.

Distinction between instituted and substituted trustees.

Delectus personæ.

In what manner power should be exercised.

Number to be appointed.

and distinctly stated, and all the limitations of such a power will be strictly enforced.¹ Such trustees differ most materially from those specially named and appointed by the trustor; for although the property may be vested in them, and therefore they are proper trustees, still the most important distinction of proper trusts, that of special *delectus personæ*, does not extend to them; and therefore, in questions as to the necessity of their continuance, the Court will generally view them in a different light.² It is this *delectus personæ* which gives rise to the strictness of interpretation in regard to the devolution of their powers by trustees under a deed.

The number and powers of such substituted trustees must strictly correspond with that of those specially named and appointed by the trustor, unless a special regulation as to it shall be made in the trust-deed authorizing the appointment; for it might be a serious objection, that a greater number of trustees had been so substituted, or that, in regard to public institutions, the trustees had devolved their powers upon a smaller number of trustees than the trustor himself had considered necessary. Thus, where a party, by trust-deed of settlement, conveyed his property to four trustees, and the acceptors or survivors, whereof a majority to be a quorum, with power, in the event of any declining to act, or dying, to add and assume other proper persons in their place — two only accepted, and they, by deed of assumption, assumed three in place of the two who

¹ Such a power is also usually given where the deed contains a clause authorizing the exoneration of trustees during the subsistence of the trust.

² See Macpherson, 19th Dec. 1840, 3 D. 315; and *sup.* page 95. See, however, Roughead, *inf.* page 140.

declined,— it was held, that this was no general power of assuming trustees, but simply that, in the case of one or more of the trustees named failing by death, or declining to accept, the remaining trustees should assume others in their place — that, in this case, a power of supplying the deficiency in particular circumstances, had been converted into a general power of assumption — and as, by law, both here and in England, special faculties or powers are of strict construction, and must be strictly executed, so there may be an excess which is clearly separable from the general exercise of the power ; and, in that case, the court will only reduce *quoad excessum* — but if the transgression of the power is inherent in the whole act itself, the court will not interfere to make a new act in exercise of the power — that, therefore, as this was contrary to the plain intention of the testator, and as it cannot be known which two would have been preferred, or whether any of them would have been named without the third, the assumption of all three was void.¹ Where such trustees are improperly assumed, they will not be entitled to pursue, though they have acted for several years without challenge in the administration of the trust.² But where power was given to the trustees, or the survivor, to assume such person or persons, one or

*Specia-
powers of
strict con-
struction as
regards the
fact of being
exercised.*

*Improper
assumption of
trustees.*

¹ See note by Lord Moncrieff, in Ferrie, 31st May, 1834, 12 S. 672 ; and also Davidson, 9th July, 1835, 13 S. 1082 ; Freen, 28th June, 1832, 10 S. 727 ; see also Eng. Ca. of Hulme v. Hulme, 2 M. and K. 682 ; but see D'Almaine v. Anderson, V. C. 1st Feb. 1841, Lewin on T. 465 ; See also Wilkinson v. Parry, 4 Rus. 272 ; Attorney-General v. Pearson, 3 Mer. 412, per Lord Eldon.

² Davidson, *et seq.*

more, as they should think fit, to be trustees along with them, and to have the same powers, and subject to the whole declarations with themselves, in the event of the non-acceptance or death of any one of them—the assumption of a trustee, by a sole survivor, though on deathbed, was held to be effectual.¹ So, also, where a disposition was to certain trustees nominated, and the survivor, or who should be assumed by the trustees to act with them,—the majority alive and accepting being always a quorum—and to the assignees of the trustees; the obligation to infest being to the said trustees before mentioned, and to be named and assumed, or their assignees,—it was held, that the power of assumption and destination was to be given to the quorum of all the trustees, to whom the conveyance was made, whether that quorum might consist of original trustees only, or of original and assumed trustees together, or of assumed trustees, they only being alive and accepting.² Where it was declared, in a trust under a contract of marriage, that it should be competent to the husband and wife, during their joint lives, by joint deed or deeds, to substitute new trustees, when necessary, from death or renunciation, and that, in the event of the death of the husband during the lifetime of the wife, it should be competent to her, with the consent of the majority of the acting trustees for the time, to substitute, in like manner—the majority of the surviving and accepting trustees being a quorum—and then, that the last surviving trustee, failing all the rest, should have

Special interpretation of intention.

¹ Roughhead, 5th March, 1833, 11 S. 516.

² M'Leishe's Trustee, 26th May, 1841, 3 D. 914, per Lord Moncrieff.

full powers in terms of the deed, — the husband having died, predeceased by all the trustees named in the deed, a petition, at the instance of the widow, for the appointment of a judicial factor to carry the trust purposes into effect, was refused as unnecessary, as she was held to have power to nominate trustees.¹

It would seem, that in trusts for perpetuity, that is, mortifications, the powers of trustees, in regard to the substitution of new trustees, ought to be more liberally interpreted than in the case of trusts of a more limited duration, and in regard to which there is a more special *delectus personæ*; for, in the former, permanence is, in general, more looked to than individual confidence.² The chief case of difficulty in these trusts must arise where the trusts conferred are of a very discretionary nature.

It must be observed, also, that the appointment of new trustees may be a duty as well as a power of trustees.³ This would be the case, at least, where the words "shall appoint" are used.

With regard to the most effectual mode of

Powers of
substitution
under mortifi-
cations.

Substitution,
when a duty.

¹ Bailie, 11th March, 1835, 13 S. 681, and see *infra*, h. t. 3, rule 5. It has been observed by Lord Brougham, (*obiter*), in the case of *Millar v. Black's Trustees*, 4th July, 1837, 2 S. M. 389, that, "though the trustees are only empowered to assume on vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it, even if they altogether decline themselves." This remark is the more practically applicable, as it has been decided, that a party, who merely accepts of a trust for the purpose of making a quorum, in order to appoint a substitute, in terms of such authority contained in the trust-deed, does not thereby render himself liable for the trust actings. Blair, 28th Jan. 1836, 14 S. 361. See *supr.* page 74.

² See Eng. Ca. of Attorney-General *v. Scott*, 1 Ves. 413, 415; Attorney-General *v. Floyer*, 2 Vern. 748; and see *Attorney-General v. Bishop of Lichfield*, 5 Ves. 825; but see *Folly v. Wontner*, 2 Jac. and Walk, 245, and *Lewin* on T. 417.

³ See *Doe v. Roe*, 1 Anst. 86.

number that quorum shall consist ; and that failing there being such quorum left, the trustees shall, previous to accepting such resignation, complete the number of trustees, by the assumption of another, or others, in his or their place, as the case may be ; otherwise, unless some such precaution shall be used, this clause might become the means of defeating the trust.

Of course, all such clauses must be held as depending on the proper execution of the trustee's duties, up to the time of intended resignation ; and that in every respect his actings in the trust shall have been such, as that his co-trustees, and the beneficiaries, or others having the power of interference, or giving consent under the deed, can competently discharge him from his office, and all liability incurred in fulfilling it.

**Secondary
conditional
special
powers.**

Secondary conditional special powers, or powers of borrowing where such are not specially given by trust-deeds, are of the combined nature of special, and general or implied powers.

**Powers of
borrowing.
Subsidiary to
power of sale.**

**Of two kinds.
I^{presumed.}**

A power of borrowing or burdening a trust-estate is dependent on, and subsidiary to, a power of sale, on the general principle or rule of law, *major includit minorem*;¹ for borrowing is of two kinds, 1st, where it amounts merely to such incidental borrowings, more properly termed credits, as are necessary for the ordinary conducting of trust-affairs, or even of repairs and improvements, where of a reasonable

¹ In the law of England, a trustee, who is appointed to sell merely, cannot execute a mortgage ; *Haldenby v. Spofforth*, 1 Beav. 390 ; but he may do so rather than sell where the estate is conveyed to him for behoof of certain parties, and burdened with debts ; *Ball v. Harris*, 4 M. and Cr. 264.

amount; or, 2d, Where it amounts to more than a ^{and special} credit, and, in effect, to a burden or partial alienation of the estate itself. The former is a general and presumed power, incident to all trusts of heritage, but one which can seldom be resorted to; as the general rule in all cases is, that the expenditure for incidental matters shall seldom be equal to, and never greater than the income; expenses of a greater kind can only arise from, or be justified by, a special purpose declared in the trust-deed, and for the execution of which, powers will necessarily be conferred.¹ The latter is of the nature of a special power, not presumed, but specially declared, or dependent upon a greater power, that of absolute alienation.² As the lesser amount of alienation will always be presumed, rather than the greater, borrowing will be presumed in preference to sale, where the object or purpose of the trust may be attained by it. But where the purpose is such, as in order to its execution, will render necessary the incurring of such a liability, or creating of such a burden, as by ordinary management the income of the estate would not be sufficient to liquidate within a reasonable period, or in such a period as the circumstances of the case would render desirable, then, borrowing would amount to a sale upon the most unfavourable terms.

The practical application of these distinctions is ^{Application of distinctions.} dependent in a great degree, on the definite or

Borrowing
presumed
rather than
sale.

When other-
wise.

¹ Dewar, 4th Dec. 1792, Bell's Ca. 541; see opinion of Lord Ordinary in M'Leish's Trustees, 25th May, 1841, 3 D. 914.

² It is observed in the able opinion of Lord Moncrieff, in the case of M'Leish, *sup.* that the Court gives power to borrow; this evidently means merely, that where such power is necessarily inferred, though not expressly given, the Court will grant the necessary authority.

Debts.

indefinite nature of the trust-purposes or burdens on the estate, created by the deed, or otherwise ; for, in the first place, debts being preferable to all declared purposes, their amount, on being ascertained, will determine whether, *quoad* them, the moveable estate is sufficient for their liquidation, or if not so, whether borrowing upon the heritage will be sufficient, or sale be necessary. In the second place, with regard to the declared purposes of the trust, where it is declared, that in the event of the moveable estate not being sufficient, the heritable estate shall then be liable for the accomplishing of these primary purposes, one of two courses may be adopted, first, by bonds over the heritage, in favour of these beneficiaries, notwithstanding that by assignment these bonds may pass into the hands of third parties, thereby creating direct liabilities against the estate ; or secondly, by bonds to money-lenders, for the purpose of liquidating the claims upon the estate, where, for instance, the object of the trustees is, to obtain their discharge on the ground of the purposes of the trust being concluded. Another class of cases occur,

Declared purposes.

Special or extraordinary expenses of trust-management.

though less frequently, namely, as to whether trustees have the power of borrowing for the purposes of trust-management merely, over and above the general credit before alluded to. The powers in such cases are of very strict interpretation, for whilst powers of alienation may imply powers of borrowing for the purposes of division, and clearing of incumbrances, such a power will not readily be implied, and indeed, seldom, if ever so, for purposes of management ; whether for improvement or increase of income, as by mining or otherwise ; for it is not to be supposed that a trustee would contemplate the creation of

burdens on the trust-estate for such purposes, and these would require not merely powers, but special directions by the deeds. Such powers, with regard to all subordinate purposes, are strictly interpreted, and therefore not to be exerted where they in any way interfere with the chief purpose of the trust, namely, the preservation of the estate, and keeping of it free from incumbrances ; as, for instance, where the trustee has, from evidently over calculating his means or moveable estate, directed subordinate purposes to be effected, as the erecting of buildings, making of improvements, or carrying on any branch of trade, &c. where the execution of these must necessarily make burdens on the estate, and so defeat the object for which they were intended.

2. Unconditional special powers are unconditional, Uncondi-tional special powers. not as regards the manner, but as regards the fact of being exercised ; such powers, therefore, are not discretionary, but imperative, and amount to obligations, not only to carry into effect the purposes of the trust arising from the general nature of the office, but also the special directions given by the deed ; these, therefore, when their nature and limits are determined, are merely part and parcel of the duties of the office, and are hereafter treated of under that head.

The amount of discretion incident to trusts from the general nature of the office, having already been considered, the interpretation of special powers and conditions now fall to be treated of.

Two general rules may be stated in regard to this subject :— Rules of special powers.

1. Where unconditional special powers are expressed in general terms, they are to be liberally

interpreted in support of the execution of the trust.

2. Where they are stated in express terms, they are to be strictly interpreted.

The special rules are as follows :—

1. Special powers and conditions are amply interpreted, both as regards personal qualification, and to enable trustees to exercise freely their judgment and discretion in relation to matters which are clearly included in the trust-conveyance ; for wherever a trust is created, a right of property sufficient for the execution of it is implied ; as trustees must be presumed to have power to do whatever it is their duty to do.

2. They are to be strictly interpreted in relation to matters regarding the tenor, nature, or amount of the trust-property, or where not plainly accessory to a special power given ; for the right of property in trustees is likewise not greater than the execution of the trust necessarily requires ; so that the declaration of a special purpose may exclude the exercise of powers of a different, though apparently of a subsidiary class.

3. Where powers or purposes are definitely and explicitly stated, they must be strictly complied with ; for no discretionary power of modifying, extending, or varying them in any way, is allowed.

4. Where a special restriction exists in the deed with regard to any particular act or acts, such restrictions are to be strictly enforced, to the exclusion of powers of a character subsidiary to that specially excluded.

5. Where special powers are not strict or imperative, but directory, they may be interpreted by the

Court in accordance with the spirit, though not with the precise letter of the deed.

1. In accordance with the rule, that where matters are clearly included in the trust-conveyance, powers are to be amply or liberally interpreted, where power was given to trustees, or the survivor, to assume such person or persons, one or more as they should think fit, to be trustees along with them, in the event of the non-acceptance or death of any one of those appointed,—the assumption of a trustee by a sole survivor, though on deathbed, was held to be effectual.¹ That is to say, trusts, although strictly interpreted as regards the fact, are liberally interpreted as regards the manner of being exercised.

Wherever the primary object of a trust is the payment of debts and other burdens created by the trustor, the law holds, that all other purposes are subordinate to these—the former being constituted claims upon the estate, the latter being merely conditional interests. Where, therefore, a proprietor, whose estate was burdened with heritable bonds to the extent of L.9000, conveyed it to trustees to sell and pay debts to the amount of L.7500—and, with consent of the proprietor, they exposed the estate to sale at L.12,500, but no offer was made,—it was held, that they were entitled, without his consent, to expose it at L.10,950.² So, also, where a trust-deed provided for payment of debts and provisions, and empowered the trustees to sell certain portions of the trustor's heritable estate, and to apply the same, together with the personal funds, in payment of the

¹ Roughhead, 5th March, 1833, 11 S. 516. See Power of Substitution, sup. page 137.

² Calder, 16th Dec. 1823, 2 S. 582.

*Creation of
entails, &c.*

debts and provisions — and on the trustor's death, the funds so provided proved altogether inadequate for the trust-purposes, — it was held, that although no special power of sale was expressed in the deed, there was, by a fair construction thereof, necessarily an implied power of sale ; and consequently, that the trustees were entitled to sell such property in the same manner, and as freely, as if the trustor had given special power to that effect.¹ Upon the same principle, where trusts are created for the purpose of paying debts, and entailing the remainder of the estate, or a portion of it, — the entail, of course, cannot be made until the estate shall have been cleared of debts and other burdens ; as, where estates were conveyed to trustees, *mortis causa*, with power to sell part of them for payment of debts and provisions, and to entail another part, in relation to which no power of sale was given — and the first part proved insufficient to pay the debts ; and again, where a trust was created for the purpose of paying debts, trust-expenses, and certain legacies — and provided, after payment thereof, “in case my personal means and estate should not be sufficient therefor, I appoint my said trustees to dispone, assign, convey, and make over, in terms of a deed of strict entail” — and the deed contained no express power of selling or converting into money, or burdening the personal or heritable property of the trustor — and the personal estate proved altogether insufficient for payment of the debts and legacies, — it was held in both these cases, that these were primary and preferable burdens upon the trust-estate ;

¹ Henderson, 22d June, 1841, 3 D. 1040.

and that therefore the trustees were entitled to sell as much of the heritage as should be sufficient for payment of them.¹ But where a party, after having entailed his lands, conveyed to trustees, *mortis causa*, all lands not entailed, and all future acquisitions, and his personal estate, for the purpose of applying the produce or proceeds to the purchase of lands, to be entailed in the same way as he had entailed his other lands — but gave no express power to sell — and did not specially include a property acquired prior to the date of his entail, and which it was admitted he did not intend to entail, — it was held, in a question between the trustees, concluding for power to sell that property, and apply the price in buying and entailing lands, and the heir-at-law, that they were not entitled to a decree to that effect.²

Such cases as those now stated are, when determined strictly, matters of positive duty of trustees. In interpreting powers of trustees to sell property, where, for instance, the purposes are the payment of debts and legacies, and to entail property, these powers are regulated by an important distinction between debts and legacies ; debts must be a primary object, whereas legacies may not necessarily be so.³

The principle of the liberal interpretation of powers where the purposes are clear, applies, however, more properly to cases such as the following ; as, where parties were infest in trust for payment of the trustee's debts, but with full powers of sale, and

Distinction
between debts
and legacies
as burdens.

Powers of
raising
actions.

¹ Erskine's Trustees, 13th May, 1829, 7 S. 594 ; and M'Kinnon Campbell's Trustees, 4th Dec. 1838, 1 D. 153.

² Allan v. Glasgow, 1st Sept. 1835, 2 S. M. 333, reversing 7th March, 1832, 10 S. 438.

³ See note in cases of M'Kinnon, Campbell's Trustees, and Erskine, *sap.* and *inf.* part 2, c. 7.

*Granting
heritable
securities.*

*Granting
authority to
agents to sell.*

*Special appli-
cation of
funds in
purchasing.*

carrying on all necessary actions, — in which it was held, that they were entitled to pursue a declarator of non-entry against the vassal in a portion of the heritable estate;¹ thus, a general power of raising and carrying on actions, was held to extend to extraordinary actions of this kind. Where trustees are authorized to dispose of and administer property, as to borrow money on an estate, or to sell, they have full power of disposing of these funds for payment of all debts, &c. due by the estate or the trustor, and therefore may grant an heritable security over it for money advanced to the trustor.² So, also, a general power to sell and dispone the whole, or any part of certain lands, with power also to appoint commissioners, factors, and agents under them, for managing the trust-business, is sufficient to entitle the trustees to authorize certain persons to sell and dispose of the trust-property in name of them, the trustees.³ This principle was held to apply even where a party conveyed his funds to trustees to purchase an estate, to be settled in strict entail on his son — and they purchased an estate without a mansion-house, — it was held, that they were authorized under the trust to expend a balance of the sum remaining in their hands in the erection of a mansion-house.⁴ This was held to be in conformity with the intention of the trust, the term estate being held to infer a place of residence; and that either a property must have been purchased with a mansion-house, and an additional price paid

¹ Ker, 7th Dec. 1838, 1 D. 179.

² Dewar, 4th Dec. 1792, Bell's Ca. 8vo. 541.

³ Innes, 22d June, 1822, 1 S. 518.

⁴ Sprot's Trustees, 11th March, 1830, 8 S. 712.

accordingly, or one must be built. So, also, where a trust was for the purchase of lands, it was held competent to purchase superiorities, such an acquisition being thought beneficial to the estate.¹ But such authority depends very much on the interpretation of each individual case.

In accordance with the rule now treated of, where power had been conferred upon a widow by her husband, of disposing of a certain part of his estate conveyed to trustees, to whomsoever she pleased — and she, by her deed of settlement, conveyed it to her sister, together with all her own property — and declared that her succession should be burdened with the payment of her debts, — it was held, that the sister could not claim the portion of the deceased husband's estate, without being liable for the debts of the widow to that extent.² Here the extensive nature of the power of disposal, implied that it was meant, notwithstanding the trust-investment, to be disposable by the widow as part and parcel of her estate, disposable at her death, and subject to the conditions attending it generally.

2. A very distinctive instance of the application of the rule, that trusts are to be strictly interpreted as regards the tenor, nature, or amount of the trust-property, or where not plainly accessory to a special power given, occurs in the case of *Graham's Trustee v. Boswell*,³ in which there being a deed conveying an estate to the trustees, to hold it for a term of years, and then denude in favour of certain parties, with a clause empowering them to "grant tacks of

Power of
disposal, or
bequest under
a trust.

¹ Sharpe, 11th Feb. 1823, 2 S. 203. But see part 3, c. 8, s. 3.

² Watt, 21st Nov. 1829, 8 S. 107.

³ 2d Dec. 1830, 9 S. 121.

my lands, and appoint factors thereon ; and to settle and adjust all accounts, of whatever kind, that may be unsettled at my death ; and to do every thing relative to the management of my estate and affairs that I could do myself,"— it was held, that the trustees were not entitled to raise an action of division of commony. The powers in this trust, although very extensive, were held to be powers of management only, and therefore could not be extended to an act altering the nature of the property itself, as vested in them, by converting what was held by them in commony, into a smaller subject to be held in fee simple.

Under a special provision.

A strict rule of interpretation of powers may arise from a special provision of the trust-deed ; as, where a party is by deed appointed trustee and factor, it is incompetent for his co-trustees to supersede him;¹ whereas, if appointed by the trustees themselves, they would certainly have that power.

Power of a different, though apparently subsidiary, class.

Again, the declaration of a special purpose may exclude the exercise of other powers of a different, though apparently of a subsidiary class. Thus, a trust for the purpose of sale does not necessarily convey a power of granting leases ;² for the declaration of the special purpose excludes the exercise of the ordinary power conveyed by a trust in general terms. So, also, the declaration of a special purpose, and consequent conveyance of a special and definite power, may operate as an exclusion of the application of the general rule of law, *major includit minorem*.

¹ *Fulton*, 15th Feb. 1831, 9 S. 442.

² See English case of *Evans v. Jackson*, 8 Sim. 217 ; and still less can trustees lease to one of themselves ; *ex parte Hughes*, 6 Ves. 617 ; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, 500.

Thus, a trust for the *purpose* of sale will exclude the power of borrowing.¹ So, also, in England it has been held, that if lands be devised to trustees to sell for payment of debts, and, subject to that charge, be given to A for life, without impeachment of waste, with remainders over, (*i. e.* a disposition to A in liferent, with the fee to B and C, subject to a power of sale for payment of debts,) the trustees must not raise the money by a sale of timber, which would be a hardship on the tenant for life, (liferenter,) but by a sale of part of the estate itself; and should the trustees have improperly resorted to a fall of timber, the tenant for life would have a charge upon the lands to the amount of the proceeds.²

It may be stated, as a general rule, that power of originating or carrying on matters connected with trade or manufactures will never be presumed, and, therefore, requires the most strict and special powers. In the case of copartnery, it has been decided, that trustees are not bound at once to discontinue the connection of the trust-property with it, unless so directed by the trust-deed; and are, therefore, not liable for loss that may arise to the estate thereby; but still that does not apply to the case of trustees engaging in the copartnery for behoof of the estate, but simply to their power, and, perhaps, in some cases, their duty of allowing the estate to derive the benefit arising to it from a

General rule
as to trade.

¹ So, in England, trust for sale, if there be nothing to negative the settler's intention to convert the estate absolutely, will not authorize the trustees to execute a mortgage; *Haldenly v. Spofforth*, 1 Beav. 390.

² *Davies v. Westcomb*, 2 Sim. 425, and Lewin on Trusts, 333. Nor is this inconsistent with the rule as to borrowing under a power of sale, for it is the latitude incident to a power which authorizes it, (see page 144,) and which, moreover, is used in support of the interests of all parties under the deed.

profitable concern.¹ The course to be adopted by trustees, in such circumstances, will be treated of under the title regarding duties.

Effect of explicit declaration of powers or purposes, or strict interpretation.

3. The rule, that where powers or purposes are explicitly stated, they must be strictly complied with, applies to questions of construction of special powers, as in regard to the special terms of a power of division, or of appointing trustees.² Thus, in the case of a power of apportioning an estate, where it is simply to divide it among a certain party's children, although discretion be allowed as to the amount of the provisions, still by this power, which is definite and explicit, and the most special of all powers, a vested interest is created in the whole of the children referred to ; and, therefore, the trustee, in making such division, is not entitled to deprive any of them of a share, but must divide it amongst the whole. Thus, where a testatrix made a provision in her settlement for payment to her daughter, in life-rent, for her life-rent use alienarily, and to her children, in such proportions as she might appoint ; and failing thereof, equally among such of them as should survive the testatrix, share and share alike, in fee, of a certain sum—and nine children survived their grandmother, the testatrix, but two of these predeceased their mother, without issue—and their mother, in exercise of the faculty, executed a deed of distribution, allotting a very small proportion of the entire sum, in various proportions, among six of the surviving children, and the whole residue to the seventh,—it was held, that immediately on the death of the testatrix, a *jus quæsิตum* vested in each

¹ Thomson, 16th February, 1838, 16 S. 560.

² See *sup.* page 137.

of the nine children then alive, to some share of the sum of which their mother could not deprive them ; that the omission to allot any share on account of the two children who predeceased their mother, and which would have fallen to their representatives, rendered the deed of appointment disconform to the will of the testatrix ; and that the deed of appointment being thus disconform, must be altogether set aside.¹ This rule applies also to cases where the duties, as expressed by the deed, are fixed and definite, and expediency suggests, or at least appears to suggest, that it would tend more to the advantageous attainment of the main object of the trust, that a course, varying, more or less, according to the circumstances of the case, from that specially laid down in the deed, should be adopted. The rules previously stated apply to questions of construction of powers, properly so called, that is, what they ought to do, and may do ; the present rule applies to trusts, as distinguished from powers, and therefore to the question, how the precise powers given ought to be executed. These, therefore, are powers to which the most strict interpretation is to be applied. Numerous examples of the application of this rule will be found under the head of the duties of trustees, to which subject it of course mainly applies.²

The duties of trustees, in trusts for charities, are usually of a very specific and definite kind, the details being, in general, pretty fully stated in the

Equivalent to
duties.

Powers of
trustees in
trusts for
charitable
and benevo-
lent purposes.

¹ Watson, 17th Feb. 1837, 15 S. 586 ; Sivright, 27th Jan. 1824, 2 S. 643 ; Stein, 8th Dec. 1826, 5 S. 101, per L. Robertson, in Milne, 6th June, 1826, 4 S. 679 ; and Eng. case of Kemp *v.* Kemp, 5 Ves. 849.

² See part 2, c. 5.

deed, and the duties chiefly those of superintendence, and not of individual trust and exercise of discretion, except in regard to the execution of the trustor's intention as to the original establishment or application of the fund, as to which, likewise, there is little peculiar to them, as distinguished from trusts generally. The principal, and almost the only confidence reposed, is in the choice of the objects of the charity from a class nominated by the trustor, in performing which office, every thing indicating a limitation of that class must be strictly attended to.

May grant leases.

The trustees may, of course, do whatever is absolutely necessary for the carrying of the object of the trust into effect. Thus, they may grant leases of lands.¹ But, in regard to alienating the property, it has been decided, that they cannot do so gratui-

Cannot alienate gratuitously.

¹ Town of Edinburgh, 25th July, 1694, M. 9107 ; see Bow, 6th Dec. 1825, 4 S. 276. Governors of charities, of course, cannot grant leases to, or in trust for, one of themselves, Attorney-General *v.* Dixie, 13 Ves. 519, 534 ; Attorney-General *v.* Earl of Clarendon, 17 Ves. 491, 500 ; or containing any covenant for the private advantage of the trustees, Attorney-General *v.* Mayor of Stamford, 2 Sw. 592, 593. And the two principle points to be attended to are, that they be for an adequate consideration, and of a proper and reasonable duration, otherwise the court will interfere, Attorney-General *v.* Morgan, 2 Russ. 306. The lease may be annulled, on the ground of undervalue, East *v.* Ryal, 2 P. W. 284 ; Attorney-General *v.* Lord Gower, 9 Mod. 224, 229 ; Attorney-General *v.* Magwood, 18 Ves. 315 ; Attorney-General *v.* Dixie, 13 Ves. 519 ; Poor of Yervel *v.* Sutton, Duke, 43 ; Eltham Parish *v.* Warreyn, Duke, 67 ; Wright *v.* Newport Pond School, Duke, 46 ; Rowe *v.* Almsmen of Tavistock, Duke, 42 ; Crouch *v.* Citizens of Worcester, Duke, 33 ; but it must be of more than a trifling amount, Attorney-General *v.* Cross, 3 Mer. 541, per Sir W. Grant. A limitation as to the duration, and against increase of rent, contained in the deed, was held not to justify the granting of leases, from time to time, at no more than the original reservation, Watson *v.* Hinsworth Hospital, 2 Vern. 596, per Lord Cowper ; and see Lydiatt *v.* Foach, Id. 410 ; Attorney-General *v.* Master of Cathrine Hall, Cambridge, Jac. 381. But the security of the rent being the chief point regarded, an undervalue must be fraudulent to render the lease null ; *ex parte* Skinner, 2 Mer. 457, per Lord Eldon. The length of the lease will, of course, with us, be determined by the ordinary rules as to leases by trustees ; see *infra*. part 2, c. 5.

tously, or without adequate value.¹ But in the case of the Merchant Company and Trades of Edinburgh Exceptions.² v. the Governors of Heriot's Hospital,³ where the funds were directed to be employed towards purchasing certain lands in perpetuity, to belong to the Hospital, and the yearly value of the lands so purchased to be appropriated to the purposes of the trust,— it was held, that the trustees had power to feu out these lands. Here the power of selection of the source of income, and the power of subsequent management and application of funds, was held to imply a certain latitude or discretion as to the improvement of the source of income so obtained or selected. And in the case of the Trustees of Mrs Moor's Mortification v. Wilson,⁴ where a sum was bequeathed for the purpose of being invested in land, for behoof of the poor of a parish for ever—and certain lands having been purchased which held of the crown,— the trustees were held entitled to dispose of the superiority for the benefit of the trust. Here the original power of selection was held to imply a farther power of adjustment, or completion merely, but not in the nature of a power of alienation of the trust-estate.⁴

¹ Christie, 6th July, 1774, M. 5755.

² 9th August, 1765, M. 5750.

³ 25th June, 1814, F. C.

⁴ These cases are, however, special in their nature, and must not be looked upon as establishing any right or principle of extension of powers of disposal or alienation of the trust-property. Thus, in England, it is held, as a general rule, that trustees of charities have no authority to make an absolute disposition of the charity-estate, as to part with lands to a purchaser, and substitute, instead, the reservation of a rent, Attorney-General v. Kerr, 2 Beav. 420; Blackston v. Hemsworth Hospital, Duke, 49; Attorney-General v. Brettingham, 3 Beav. 91; and see Attorney-General v. Buller, Jac. 412; or accomplish the same end by demising for long terms, as for 999 years, Attorney-General v. Green, 6 Ves. 452; or for terms of ordinary duration, with covenants for perpetual renewal, Lydiatt v. Foach, 2 Vern. 410; Attor-

**Removing
teachers.**

Where power of appointing teachers is given in general terms under a deed of mortification, or other trust, the trustees have the power of removal at pleasure.¹

**Right to
surplus.**

In regard to the right to the surplus, where there is a conveyance for a certain definite purpose, and directions given in regard to the amount of the interests to be created,— it has been held, in the case of the Hospital of Perth *v.* The Patrons of Butler's and Jackson's Mortification,²— that where an estate, originally destined for the support of a certain number of poor persons in an hospital, in the same manner in which other poor persons were then kept, had risen considerably in value, so as to admit of a much larger allowance to each pauper than they got at the date of the foundation, the court directed the whole proceeds to be divided among them. And in the recent case of M'Leishe's Trustees *v.* M'Leish,³ where a party's whole funds and estate were conveyed solely for the use of the poor of the Scotch Episcopal communion of Scotland,— it was held, that notwithstanding the specification mentioned — a certain number of beneficiaries, and a certain proportion in which the annual proceeds were to be distributed —

ney-General *v.* Brooke, 18 Ves. 326 ; or by granting reversionary terms, see Attorney-General *v.* Kerr, *ut sup.* And although an absolute disposition is only considered a breach of trust, when the proceeding is inconsistent with a provident administration of the estate for the benefit of the charity, see Attorney-General *v.* Warren, 2 Sw. 302, and Wils. 411 ; Attorney-General *v.* Hungerford, 8 Bl. 437, and 2 Cl. and Fin. 357 ; Attorney-General *v.* Kerr, 2 Beav. 428 ; still the general principle applies to our law.

¹ Gibson, 11th March, 1836, 14 S. 710, and 1 Robin. Ap. Ca. 16 ; Adam, 7th July, 1814, reported in note to Gibson, 14 S. *ut sup.* ; Mason, 23d Jan. 1836, 14 S. 343 ; Gibson, 22d Dec. 1837, 16 S. 301 ; Bell, 15th June, 1836, 16 S. 1136 ; Melvin, 4th Dec. 1841, 4 D. 172.

² As reported in Bell's Ca. fol. 173 ; incorrectly reported in M. 5758.

³ 25th May, 1841, 3 D. 914.

the whole estate was intended to be conveyed, and that, therefore, any surplus income arising, after satisfying the defined sums appointed to be paid, might be competently employed to add to the number of persons fairly within the scope and meaning of the trust-proprietor, or to increase, to a reasonable extent, the sums to be paid to the individuals intended ; or, otherwise, be reserved by the trustees, in their discretion, for supplying deficiencies in future years. In these cases, the principle proceeded on is, that where it was evidently the intention of the trustor, that the whole estate, as existing at the period of the creation of the trust, was to be applied to the purposes of the trust, and the general property actually conveyed is clearly ascertained, any surplus is a mere accessory.

Or objects of appropriation

Where a right to the surplus may or does exist in the heir-at-law, the trustees cannot, by implication or interpretation, be held as entitled either to sell or borrow. They can only do so if such powers are specially given by the trust-deed. Where they are only authorized to distribute or apply the free proceeds of the estate, the debts may be paid from the gross produce; and repairs must be paid from the same source before there can be any free produce to distribute.¹ Nor is this at variance with the rule as to powers,² that where the evident purpose of the trustor cannot be carried into effect without certain things being done by the trustees, such powers are presumed to have been given, which depends upon another principle altogether, that being the case of a

*Right in
heir-at-law.*

¹ M'Leah, *ut sup.* per Lord Moncrieff.

² See *sup.* page 129.

positive primary object declared by the truster, to which ulterior objects are to be held as subsidiary; whereas the question here is between an existing right, that of the heir, and a right for a special purpose granted to a different party, as to whether that right shall be extended beyond the precise terms of the bequest, and thereby interfere with an existing right. And moreover, the principle of this extension of powers has been doubted by very competent authority, and ought by no means to be applied to cases of an opposite nature.¹

General rule
as to applica-
tion of funds;
intention of
truster.

The general rule as to the application of the funds to the purposes of the trust is, that the intention of the truster shall be liberally interpreted. Thus, where a mortification was made for the purpose of keeping idle boys at work by employing them in a woolen manufactory, it was held competent to employ them in a linen manufactory.² And where a sum was mortified for maintaining at college three sons of craftsmen of Aberdeen,—it was held, that when there were not three to present, the patrons were bound to present three other boys.³ Where a mortification is created chiefly for a certain purpose, but other accessory duties are attached to it by the deed, notwithstanding that these purposes should cease from any necessary cause, the whole sum will be due for the support of the primary purpose of the trust, if that be not so much more than sufficient as plainly to go beyond the object of the truster, and if

¹ McLeish, *et seq.*; and Allan, 1st Sep. 1835, 2 S. M. 333. See also Trusts by Operation of Law, part 3, c. 2, s. 4.

² Town of Edinburgh v. Binny, 25th July, 1694, M. 9107.

³ College of Aberdeen, 14th Feb. 1710, 2 Fount. 557.

there be no one who has a more stringent claim.¹ The internal economy and application of the funds, apart from questions as to objects of the trust, is a matter properly in the discretion of the trustees alone, and not to be interfered with unless in regard to important matters of arrangement, and where their conduct is very evidently unjustifiable.² But

Internal
economy.

¹ Kirk-Session of Monimail, 21st Nov. 1828, 7 S. 45. A number of questions have occurred in England as to the application of the funds to the purposes of such trusts, which, although very special in themselves, and by no means to be taken as of positive authority in our law, may be referred to in illustration. Thus, trustees, whether individuals or corporations, must not divert their application, as if a trust for a preacher in one parish be applied to another parish, or the poor, or such other purpose; Duke, 116; and see Wivelscom, case Id. 94; or for the poor of one parish, and they extend it to other parishes; Attorney-General v. Brandreth, 1 Y. and C. Ch. Re. 200; or to repair a chapel, and the rents be mixed up with the poor-rate for parochial purposes; Attorney-General v. Vivian, 1 Russ. 226, 237; or for erecting an hospital, and it is diverted to paving and cleansing the town; Attorney-General v. Kell, 2 Beav. 575; or where a chapel was granted for the use and benefit of a school, it was held that the revenues of the charity could not be applied towards enlarging the chapel for the accommodation of the inhabitants attending divine service in it; Attorney-General v. Earl of Mansfield, 2 Russ. 501. So, also, a fund for relief of poor citizens, who often were grievously burdened by the imposts and taxes of the city, was held not to be applicable to the payment of rates, or the support of such poor as received parish relief, but only for the relief of such poor as were not supported by the parish; Attorney-General v. Corporation of Exeter, 2 Russ. 45, and 3 Russ. 395. And, of course, much less can the trustees abolish the subject which the trust was meant to support, as a chapel; *ex parte* Greenhouse, 1 Mad. 92, reversed on technical grounds, 1 Bl. N. R. 17.

² So, also, in England, the powers of trustees, as regards the management of the trust, are liberally interpreted. Thus, where trustees were directed to apply the rents "towards the necessary finding a master, and for the pains of such master," it was held competent for them to apply part of the revenue towards rebuilding and repairing the school-room and school-house; Attorney-General v. Mayor of Stamford, 2 Sw. 592. So, also, a trust "for the relief of the poor," was held to authorize an application of the funds to the building of a school-house, and the education of the poor of the parish; Wilkinson v. Malin, 2 Tyr. 544, 570. And where an estate had been conveyed to trustees for the purpose of repairing a church, and chapel of ease thereto belonging — and the parish had taken down the chapel to erect a new one on a different site, — it was held, that the trustees were entitled to expend the accumulated rents upon the rebuilding of the chapel; but it was held, that the rents only,

in all their actings, trustees should beware not to go beyond the clear intention and authority of the trust-deed, particularly in regard to measures in any way affecting the trust-property ; as by doing so they interfere with the right which exists in the truster's (founder's) heirs and successors.¹

Right to en-force application of funds.

Although in mortifications, the heirs-at-law of the trustor have no right *qua* heirs, to interfere in the proper and ordinary administration of the trust, yet a title for ever remains in them to challenge, by action in the Court of Session, which has the power of controlling administrators generally, any positive abuse of the trust, or diversion of the funds to other purposes than those for which alone it has been constituted ;² which right belongs also to executors or administrators,³ as well as to all persons having an interest to complain of the actings of these trustees.⁴

and not the corpus of the estate, could be so applied ; and the Court had great doubts whether any thing could be laid out upon the fitting up of the chapel ; Attorney-General v. Foyster, 1 Anst. 116. So, also, where the founder of a school directed that certain salaries should be paid to the teachers, but made no prohibition as to raising them, the trustees were held to be entitled to raise them to a reasonable amount ; Attorney-General v. Dean of Christchurch, 2 Russ. 321. But if a fund be given, not for individual benefit, but for the discharge of certain duties, as for the support of a school-master, and the fund increase to such an extent as to yield more than a reasonable compensation for the duties to be performed, the Court will not allow the surplus to be expended unnecessarily, but will order it to be applied for the promotion of some other charitable purpose ; Attorney-General v. Master of Brentwood School, 1 M. and K. 376, 394. But the disposal of the surplus in such a case in Scotland would depend on the special terms of the deed, not upon any arbitrary exercise of discretion on the part of the Court.

¹ See Trusts by Operation of Law, part 3, c. 4.

² M'Leah, *ut sup.*; Christie, *ut sup.*; Hill, 14th April, 1826, 2 W. S. 91.

³ Campbell and M'Intyre, 12th June, 1824, 3 S. 126; Macauland, 16th Jan. 1793, M. 2010.

⁴ Bow, 6th Dec. 1825, 4 S. 276; Christie, *ut sup.*; Heriot's Hospital, *ut sup.*; Ross, 14th Feb. 1818, 5 D. 589. For farther information as to the history, &c. of this subject, see Hunter on Landlord and Tenant, 112.

4. Hence occurs the rule, that as the special provisions and conditions of trust-deeds must be strictly complied with, so also, more particularly, where a special restriction, or strict specification amounting to a restriction, exists in the deed, with regard to any particular act or acts, such restrictions are strictly enforced, to the exclusion of powers of a character subsidiary to those specially excluded. Rule as to special conditions or restrictions.

Thus, where there is an express provision against lands being sold, they cannot be granted in feu in return for a reserved rent, with or without a sum immediately payable.¹ And where, by a deed of mortification, lands were conveyed for the education and entertainment of three bursars, and the rental having in course of time greatly increased, a contract was entered into between the patron and administrators of the mortification, to increase the number of bursars in proportion as the rental should increase; this contract, after having been acted on for more than forty years, was reduced, on the ground of its being in violation of the deed of mortification — it being in the original deed expressly provided, that what should be over and above the entertainment of the foresaid youths, and payment of their regents, should be bestowed entirely upon them, in three proportions, for certain purposes.² Where lands were conveyed to trustees, who were directed to pay two-thirds of the rents to two young men in continual succession, descendants of the testator's brothers — and if such should fail, and be extinct, then to any other young men of the same surname, the provision being to endure ten years each period, Prohibition to sell. As to surplus. Limitation as to purposes.

¹ Craigerook Mortification, 19th June, 1794, Bell's Ca. fol. 49.

² Ramsay, 7th June, 1842, 4 D. 1366.

after which the right of each bursar should finally expire, and be extinguished, and his place taken by another,—the last remaining of the legitimate descendants having enjoyed the provision, it was held, that no individual who had enjoyed the provision for one free period of ten years, could ever again be entitled thereto; and that the son of an illegitimate descendant of the trustor's brother could not be regarded as a descendant entitled to claim the provision.¹ Where a party had made application to be admitted into Heriot's Hospital, as being, in terms of the will of the founder, a poor fatherless boy, the son of a freeman and burgess of the town of Edinburgh, and his application was refused by the governors of the Hospital, while at the same time boys were admitted, of whom several had fathers alive—the applicant having raised an action against the governors, to have it found and declared that he was fully eligible to be elected, and ought to have been preferred and admitted accordingly, and that the governors were still bound to receive and admit him to the benefits of the institution, and to have them ordained to admit him accordingly—and when the action was raised, the pursuer was of an age at which he might have been admitted into the hospital, according to the laws and constitution thereof—but when the case came to be finally decided, he was past that age,—it was held, that the pursuer, being eligible to be elected and admitted into the hospital when he applied to the governors for that purpose, it was competent for the Court to declare that the governors were bound to have

¹ Cairnie, 14th Nov. 1837, 16 S. 1.

elected him ; that the action in question was a competent process in which to try any alleged error or abuse in the management, so far as the rights and interests of the pursuer were affected ; but that in respect the pursuer was, at the period of judgment being pronounced, past the age at which he could be admitted to the benefit of the institution, decree could not be pronounced ordering the governors to admit and receive him as if he were of competent age.¹

In cases of difficulty, as to the nature and extent of their powers under the trust-deed, the proper course to be adopted is, for the trustees to raise an action of declarator, calling all those interested to oppose them, in regard to the power as to which interpretation is required, if they shall think fit to do so. The course adopted by the Court will invariably be in accordance with the first rule already stated, as applicable to special trusts, namely, that of liberal interpretation, whenever the purposes of the trust are evident ; and, on the other hand, in accordance with the second rule, namely, of strict interpretation, where it is doubtful whether such matters are included under the trust, the Court will not grant authority to do such acts. Where a special restriction exists, the Court, in accordance with the fourth rule, will not interfere. Thus, the Court refused to award a greater sum of aliment to an heir, *alioqui successurus*, than was provided by the ancestor's settlement, which contained a special limitation.² Where, again, the powers appear to the Court sufficiently clear of themselves, and its inter-

Equitable
jurisdiction
of Courts of
Justice in
relation to
trusts.

¹ Ross, 14th Feb. 1843, 5 D. 589.

² Reid, 10th March, 1809, F.

ference would simply amount to the Court directing the trustees in the performance of their duties, it will on no account interfere, but leave the trustees to act upon their own responsibility.¹ And, on the other hand, as already said, the Court will, at the instance of the trustees themselves, or of those interested, interfere, by declarator, or suspension, or otherwise, to ascertain the powers of the trustees.

Power of
granting or
extending
authority.

The question, as to what are the powers of the Court of Session, as a Court of Equity, in granting or extending authority to trustees, under private trust-deeds, and when it is to be exercised, is practically one of considerable difficulty. It is evident, that whilst it possesses the power of superintendence, and control of trustees, and administrators generally, and of interpreting the intention of the trustor as indicated by the trust-deed, it cannot, *ex nobili officio*, by extension of the powers of trustees,² or otherwise, interfere with, or control the disposal of trust-property, in any greater degree than it could interfere with such property in the possession of the trustor. Therefore it may declare, that the deed, as interpreted by the Court, authorizes a particular application of the funds; but it cannot, *ex proprio motu*, grant powers of doing so.

Directory
special
powers.

5. Hence arises the rule, that where special powers are not strict or imperative, but directory merely, they may be interpreted by the Court in accordance with the spirit, though not with the precise letter of the deed. Thus, in the case of

¹ Gregorson, 14th Feb. 1842, 4 D. 678.

² See English case of Wheate v. Hall, 17 Ves. 80, 85; Brewster v. Angell, 1 J. and W. 628; and Lewin on T. 62.

Bailie, already referred to,¹ where it was declared, in a trust under a contract of marriage, that it should be competent to the husband and wife, during their joint lives, by joint-deed or deeds, to substitute new trustees, when necessary from death or renunciation, and that, in the event of the death of the husband during the lifetime of the wife, it should be competent to her, with the consent of the majority of the acting trustees for the time, to substitute in like manner, the majority of the surviving and accepting trustees being a quorum, and then, that the last surviving trustee, failing all the rest, should have full powers in terms of the deed, — and the husband having died, predeceased by all the trustees named in the deed, the widow was held entitled to nominate. Here, from the nature of the deed, and its special provisions, it was evident there could be no question as to the power, which could not be rendered inoperative by a mere direction, which, in the circumstances, could not be followed ; it would, of course, have been a totally different matter had the question been, whether she could execute the power without that consent where it could have been given ?

As already observed, the Court cannot interfere with the administration of trusts, or powers of a discretionary nature ;² but where a party, by deed of voluntary interdiction and trust, for the purpose of paying an annuity to the truster, clearing off debts, and making provisions for children, with powers of sale, the provisions for the children being,

¹ 11th March, 1835, 13 S. 681, *see sup.* 141.
² See *sup.* s. 2.

Doubtful
assumption
of power.

in the event of the total sale of the estate, and reversion or provision to the heir, of double the amount of the provision of each of the younger children, the sums intended being left blank in the deed, it having evidently been the intention of the truster to fill these up at some future time, although she had failed to do so,—it was held, that the trustees were entitled, at sight of the Court, to supply the blanks in the deed with regard to the amount of the provisions to be given to the younger children.¹ This is evidently a very doubtful decision, for the power in question being purely discretionary, the Court could not execute it itself, and, therefore, much less could it declare it where it was evidently not the intention of the truster to create such a power.²

It is inconsistent with the nature of discretionary powers, and at variance with the well established rule, that “where the testator, in the disposition of his property, overlooks a particular event, which, had it occurred to him, he would, in all probability, have provided against it, the Court will not rectify the omission by implying or inserting the necessary clause, conceiving it would be too much like making a will for the testator, rather than construing that already made;”³ or, in other words, the Court hold, *quod voluit non fecit.*

A distinction must, however, be made, as to the

The Court
cannot do
what amounts
to making a
will.

Distinction as
to nature and
amount of
discretion.

¹ Stewart, 26th Nov. 1813, F.

² See Ewen, 17th Nov. 1830, 4 W. S. 346, reversing do. 6 S. 479.

³ 2 Roper on Legacies, 407 ; Ferguson v. Dunbar, 3 Bro. C. C. 469, in note Belt's ed. per Lord Thurlow ; Bayard v. Smith, 14 Ves. 470 ; Calthorp v. Gough, 3 Bro. C. C. 395, note ; Doo v. Brabant, 3 Bro. C. C. 393 ; Denn v. Bagshaw, 6 Term. Rep. 512 ; White v. Warner, Doug. 344, note 4 ; Holmes v. Cradock, 3 Ves. 317 ; Hamberstone v. Stanton, 1 Ves. and Bea. 389 ; Parsons v. Parsons, 5 Ves. 578 ; Scott v. Chamberlayne, 3 Ves. 302-491 ; Grassick v. Drummond, 1 Sim. and Stu. 517 ; Coop v. Banning, ib. 534.

nature and amount of that discretion, for, no doubt, if the discretion be absolute, the rule as to non-interference is equally strict; for if the discretion be whatever the individual trustee, or individual trustees, shall think proper, or if they think proper, without any special limitation or direction, then, unless the trustees exercise that discretion, no vested interest can arise in any one to enforce the trust, or in favour of whom the Court can enforce it. But there is a clear distinction between such cases as these, which amount to a devolution of the truster's power of naming an heir, and where the trust-property has been conveyed for behoof of a certain class, with a mere discretionary power of division to the trustee; for a right in the subject conveyed, vests in the beneficiaries, immediately on the death of the trustor, in a *mortis causa* conveyance, subject only to the power of division in the trustee:¹ as, if an estate be conveyed for behoof of the trustor's children, with power to the trustee to divide it among them, in such proportions as he shall think proper, and he fails to do so, either by death or other termination of the trust, as on majority, marriage, or otherwise.² Thus, where one of four trustees, who were appointed to divide a sum

Power of
division
among a class.
Effect of non-
execution.

¹ Watson, 17th Feb. 1837, 15 S. 586; Sivwright, 27th Jan. 1824, 2 S. 643; Stein, 8th Dec. 1826, 5 S. 101; as also English Cases of Hands *v.* Hands, cited Swift *v.* Gregson, 1 T. R. 437, note; and Phillips *v.* Garth, 3 B. C. C. 69; Kemp *v.* Kemp, 5 Ves. 849; Rayner *v.* Mowbray, 3 B. C. C. 234; Grieveson *v.* Kirropp, 2 Keen, 653; Longmore *v.* Broom, 7 Ves. 124; and see Wright *v.* Atkyns, 19 Ves. 302; but see Pope *v.* Whitcombe, 3 Mer. 689, and L. on T. 585.

² See part 3, c. 2, s. 2. A direction to divide equally among a certain class, is of course a trust, not a power; Wharrie, 16th July, 1760, M. 6599; and English Cases of Phillips *v.* Garth, 3 B. C. C. 64; Rayner *v.* Mowbray, ib. 234.

among certain children, was dead, it was held, that a division made by the three surviving trustees could not subsist, and that the succession must fall to be divided among the children, as it would have done by course of law, *ab intestato*, it not being a trust of current administration, and the power not being to any of the four, or a quorum.¹ So, also, where a conveyance was for behoof of certain parties, or failing them, to their descendants, in such shares and proportions as should be judged proper by the trustees, or successors of them, according to circumstances, and as their necessities at the time might require it, and the trustees refused to exert the discretionary power, there being a difficulty as to the parties for whose behoof it was created,² the Court declared the rights of parties according to law.³ Here, there is a positive conveyance of a fixed sum, for behoof of certain parties; the trust-estate is not merely to vest, if the trustee shall exercise his discretion, but whether he does so or not. The interests of the beneficiaries would evidently not cease by his non-acceptance, and therefore much less should it do so by the non-execution of such a discretionary power; therefore, as the Court cannot execute the discretion, it divides the estate according to law, that is, equally. There is a clear distinction between the existence of an interest and the amount of an interest, in such cases; or in other words, there is both a trust and a power.⁴ So, also, if the con-

¹ More, 10 Feb. 1693, M. 14720.

² See Vesting, part 2, c. 2, s. 3.

³ Thomson, 16th Nov. 1814, F.

⁴ Nor is this inconsistent with the case of *Campbell v. Campbell*, 22d Dec. 1793, M. 674, and *ssp.* page 134; for there was there no special bequest, but purely discretionary power as to the sum to be applied for behoof of the children; so that without the exercise of the power, there were no funds to be disposed of by the Court. See English Cases of *Davy v. Hooper*, 2 Vern.

veyance be for behoof of such of a definite class, as the trustor's children, and in such proportions as the trustee shall appoint, notwithstanding that the trustee shall not execute the power, the estate will vest in the beneficiaries.¹

It has been said, that there is a distinction between a case of mere discretionary power, and one in which the trustor has laid down a rule, or given directions, as to the manner of exercising that discretion; or, in other words, has pointed out the reasons or conditions of its exercise. Thus, in the English case of *Gower v. Mainwaring*,² where the directions given in the trust-deed to the trustees were, to convey the residue of the testator's real and personal estate among his relations, "where they should see most necessity, and as they should think most equitable and just"—the trustees having failed, it was observed by one of the highest legal authorities, Lord Hardwicke, "Here is a rule laid down—the trustees are to judge on the necessity and occasions of the family—the Court can judge of such necessity,—that is, a judgment to be made of facts existing, so that the Court can make the judgment as well as the trustees, and when informed by evidence of the necessity, can judge what is

Effect of a rule of guidance as regards discretionary power.

665 ; *Madoc v. Jackson*, 2 B. C. C. 588 ; *Hockley v. Mawbey*, 1 Ves. jun. 143, &c. ; *Jones v. Torin*, 6 Sim. 255, &c. ; *Phillips v. Garth*, 3 B. C. C. 64 ; *Rayner v. Mowbray*, ib. 234 ; and see *Maddison v. Andrew*, 1 Ves. 58 ; but see *Reade v. Reade*, 5 Ves. 748.

¹ The reverse was held by Lord Hardwicke, in the *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61 ; but undoubtedly in the special circumstances of the case, and which is not to be taken as of any authority in our law. The leading case on this point being *Harding v. Glyn*, 1 Atk. 469 ; confirmed by *Birch v. Wade*, 3 V. and B. 198. See also *Brown v. Higge*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561, 18 Ves. 192 ; in which this subject is very fully discussed.

² 2 Ves. 87.

equitable and just on this necessity." A division was accordingly decreed to be made among the relations, according to their various necessities and circumstances, to be ascertained by remit to the master.¹ Questions of this kind have, however, apparently been viewed in a different light under the law of Scotland. Thus, in the case of *Dick v. Fergusson*, already referred to,² where the circumstances were very similar, it was held, that the powers were discretionary, and therefore could not be exercised by authority of the Court.

Jurisdiction
as to mortifi-
cations.

There appears to be a distinction between discretionary powers in the case of mortifications, or trusts for charitable purposes, and other trusts of a more private and strictly confidential nature. For in the former, unless in the case of a positive and undoubted conveyance of a purely personal discretion,³ the allocation or application of the fund is combined with such rules, of a more or less special nature, as to enable that limited discretionary power of selection to be competently performed by a substitute. The Court may, therefore, evidently interfere to execute such trusts where necessary.⁴ But in doing so it will distinguish between originating mortifications under discretionary powers of trust-deeds, and mere discretionary powers of application to purposes under an existing and established mortification, or other charitable trust.

¹ 2 Ves. 110.

² Sup. p. 134.

³ Merchant Co. and Trades of Edinburgh, 9th Aug. 1765, M. 7448.

⁴ See Campbell, 26th June, 1752, M. 14703; and Eng. case of Attorney-General *v.* Scott, 1 Ves. 413, 415; Attorney-General *v.* Floyer, 2 Vern. 748; Attorney-General *v.* Lichfield, 5 Ves. 825; but see Foley *v.* Wontner, 2 Jac. and Walk, 245; Doe *v.* Roe, 1 Anst. 86. But it must be kept in view, that the latitude allowed in England, as to mortifications, is, in many respects, greater than in Scotland.

But this liberal interpretation does not apply in the case of a special limitation.¹ Nor does it apply to interference with the capital or estate. Thus, the Court held, that it had not power to authorize the sale of a house mortified for the minister of a parish, which had become ruinous, in order to build another house for him, on certain fields which had been mortified for a glebe.² Nor, of course, can it interfere to enforce the execution of such trusts, where the constitution is defective, or the object or purpose of the trust has failed.³

The law which prevents effect being given to attempts by parents to impose restraints upon the freedom of marriage of their children, gives to the Court the right of preventing or annulling the exercise of any power created by a trust-deed for such purpose; as a disposition by a father, with the condition, that his daughter shall not marry without the consent of certain parties named by him.⁴ This rule does not apply to such conditions when created by a party under no natural obligation to provide. Thus, where a party granted a disposition to his niece, with the *proviso*, that she should not marry without consent of certain persons, the contravention was held to be relevant to annul the claim; but it was admitted as a defence, that she had required the consent, and it had been refused without a cause assigned.⁵

Limitation of
powers of
trustees from
law of
marriage.

¹ Ramsay, 7th June, 1842, 4 D. 1366; Cairnie, 14th Nov. 1837, 16 S. 1.

² Wilson, 4th July, 1818, F.

³ See *inf.* part 3, c. 2, s. 4; part 3, c. 6.

⁴ Dalziel, 9th June, 1687, M. 2971; Pringle, 20th July, 1688, M. 2972; Buntin, 7th July, 1710, M. 2972; but see Hamilton, 13th Feb. 1681, M. 2970.

⁵ Foord, March, 1682, M. 2970.

Court interferes to enforce proper performance of all powers and duties.

But although the Court cannot interfere to enforce the performance of discretionary powers, it will do so in the case of all other powers, whether in the nature of general, conditional, or unconditional special powers, in order to enforce the performance of the duties of the office, and rights of individuals. And it will do so, either against the trustee himself, or his heirs, by compelling them to fulfil the purposes of the trust, where the bequest is to the trustee and his heirs or successors, or to denude in favour of the beneficiaries;¹ or to restrain them where exceeding, or about to exceed their powers, of whatever nature those powers may be, whether discretionary or otherwise; for the Court may of course judge of the nature and limits of a discretionary power, although it may not be competent to execute it.² Thus, where there was a bequest to a son and daughter, their interest being payable termly from the period of the trustor's death, and the principal upon the youngest of them surviving attaining majority, which payments were subject to a power of division in certain parties, failing which, to the said children equally, share and share alike—the youngest having come of age nearly seven years after the death of the trustor, and applications for payment having been made without success, the trustees, six months after the payment of the principal had fallen due, executed a writing, called a deed of division, bestowing nearly the whole sum on the son, and a very trifling portion on the daughters, the terms of which

¹ See *inf.* part 3, c. 9; and as to the jurisdiction of the Court on the failure of trustees, see *inf.* h. t.

² See *inf.* part 2, c. 5; and see English Cases of Berkhamstead free-school, *ex parte*, 2 V. and B. 138; De Manneville v. Crompton, 1 V. and B. 359.

deed were not intimated to the children until action had been raised to compel payment,—it was held, that the division was incompetent.¹ So, also, the Court interferes where an attempt is made, for instance, under such a power, to bestow upon some, instead of the whole children, in a conveyance for children of a certain party in general terms.² So, also, it may of course interfere in all cases of breach of trust,³ or of personal objection to the trustee.⁴ The general rule, however, in regard to the jurisdiction of the Court of Session, as a Court both of law and of equity, is, that it will not interfere in matters of private trust, unless where the rights of individuals or ends of justice positively require it; and therefore it will not—as also in the law of England—interfere with the execution of the ordinary and competent duties and office of the trust.⁵

With regard to the competency of the form and manner of executing powers:—If a party, having a power to distribute property not his own, make a will, in which he conveys only his own property, without any reference to the power, it may, no doubt, be said, that he has not exercised the power;

Powers when
held to be
executed.
Dispositions
mortis causa
in general
terms.

¹ Stein, 8th Dec. 1826, 5 S. 101.

² Watson, 17th Feb. 1837, 15 S. 586; Sivwright, 27th Jan. 1824, 2 S. 643.

³ See *inf.* part 2, c. 5, Application of funds; Sug. Pow. c. 11, 10th ed.; Attorney-General *v.* Governors of Harrow School, 2 Ves. 552, per Lord Hardwicke; Potter *v.* Chapman, Amb. 99, per eund; Richardson *v.* Chapman, 7 B. P. C. 318; French *v.* Davidson, 3 Mad. 402, per Sir J. Leach; Maddison *v.* Andrew, 1 Ves. 59, per Lord Hardwicke; Attorney-General *v.* Glegg, Amb. 585, per eund.

⁴ See *sup.* page 123, and *inf.* h. t.

⁵ See Mackay, 13th Feb. 1824, 2 S. 711; M'Lellan, 25th Feb. 1832, 10 S. 375; Harrow School, *at sup.* 551; Cowley *v.* Hartstonge, 1 Dow. 378, per Lord Eldon; Potter, *at sup.*; Carr *v.* Bedford, 2 Ch. Re. 146; Wain *v.* Earl of Egmont, 3 M. and K. 445; Livesey *v.* Harding, Taml. 460.

but this principle is coupled with the qualification, which is legally correct, namely, that where the party, who has such an interest in the fund as to give him reasonable grounds to consider it as his own property, and having, also, the power of distribution, does distribute, it will be an effectual execution of the power.¹ Thus, where there was a conveyance to a wife, of her husband's whole moveable estate, with a power of disposal, *mortis causa*, of the residue among their children, in such portions as she should think proper, — she, having no other property, was held to have exercised that power by her latter will, in which she disposed of all the property as her own, and did not, in any way, allude to the power;² for she was invested with the fee of the property, burdened with a vested right in the children to the residue at her death, and therefore could dispose of it as her own. Under a conveyance to trustees, with directions to pay an annuity of a special sum, with power to the annuitant, by will or other deed under her hand, to dispose of, and convey, as she might think proper, after her decease, the capital sum to be set apart by the trustees, which they were directed to pay as she should order and appoint, — it was held, that a settlement, executed previous to the death of the trustor, by which the annuitant, who survived the trustor, conveyed to certain parties her whole means and estate, both heritable and moveable, which should belong to her at her death, was a valid exercise of the power to dispose of the capital in question.³ Here the

¹ Milne, 6th June, 1826, 4 S. 679, per Lord Glenlee.

² Milne, *et seq.*

³ Hyslop, 11th Feb. 1834, 12 S. 413.

fiduciary fee was in the trustees, for the purpose of preventing it from being *in pendentie*; the actual fee was in the liferenter, for there was no right vested in any third party; and therefore the liferenter could dispose of it as her own; and the testamentary deed, from its nature, must be held as a declaration of will at the period of her death. But, in a similar case, where the liferenter predeceased the testator, the legacy was held to have lapsed.¹ Where there was a power conferred on the liferenter of a trust-estate, of nominating and appointing such parties as he should think proper, to take the fee or capital of the trust-estate, but it was only on failure of others that he was to have any right with regard to the fee, and it might have been excluded by a power in the trustees, there being also a provision, that creditors were not to acquire any right to the property,—a general disposition by the liferenter, to trustees, for his creditors, of all rights belonging to him derived from another source, was held not to be an exercise of the special power of disposal of the fee in question.² Here, although the actual fee must be held to have been vested in the liferenter, and therefore disposable as his own by will in the general terms of the original trust-deed, by any deed of settlement under his hand, already executed, or to be executed by him at any time during his life; yet the deed in question was not a general, but a special conveyance, and the supposition of an intention to exercise the power was discountenanced by the limitation as to creditors.

¹ Henry, 19th Feb. 1824, 2 S. 725.

² Rollo, 26th Jan. 1848, 5 D. 446.

**Application
of English
law rule.**

The English law rule, that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject, or to the power itself, or generally to any power vested in the testator,¹ has been sought to be applied to the cases above noticed. It must be observed, that this principle applies to the case where the donee of the power has not a personal interest in the estate. Where the donee has a personal interest in the estate, a general act passes the interest.² In this respect, therefore, the law of England agrees with our own law; for if a party have merely a power under a trust-deed, of disposing of, or dividing property, it is clear, that it could not be held to be exercised by any general deed, not specially referring to the power, or the estate over which the power exists; but that, if the party possessed of the power had a personal interest, as a liferent, with a power of disposal as to the fee, a general disposition of his whole property, or whole property of that kind, would clearly be held as an exercise of the power. The question, therefore, comes to be, whether the grantee of the power has a personal interest or not. In the cases above referred to, the grantee had such an interest.

**Combined
effect of deed
of division,
and special
act of trustee.**

Where a father, who was appointed liferenter of the residue of a trust-estate, with a power of dividing the fee among his children, had a son and daughter, and executed and put on record a deed of division, by which he allotted to his son certain heritable subjects, along with the sum of L.5500 of the said money residue, consisting of a bond for L.2500, and

¹ Sug. on Pow. 385, 6 ed.

² Ib. 430.

the sum of L.1500, lent to certain road-trustees — and allotted the whole of the residue to his daughter, in so far as not allotted to his son — and thereafter, a part of the supposed residue being required for the trust-purposes, the father concurred with the other trustees in uplifting the road bond for L.1500, as well as some other bonds, the contents of which were applied for behoof of the trust — and he lived for two years thereafter, — it was held, that the deed of division was a valid and effectual exercise of the power of division ; and that the interest of the son in his allotted share of the residue of the trust-estate, was diminished by the amount of the road-bond ; and that the remainder of the residue, which was allotted to the daughter, was not liable for the deficiency.¹

Where power was given to trustees, in the event of their considering it proper, to pay to a certain party the sum of L.1000, at such times, and in such payments, as they in their discretion might think expedient — and the beneficiary survived the testator, but died before the trustees paid the money, or made any entry in their minutes binding themselves to pay, — it was held, that the legacy had lapsed, and did not pass to the executors of the niece, although, prior to her death, the trustees had entered in their sederunt-book a view of the trust-affairs, where they deducted this legacy from the free proceeds, along with debts and absolute legacies ; and although, subsequent thereto, they acknowledged that they had resolved and agreed to pay the legacy, but were prevented by her death.² Where there was a clause

Whether
intention to
execute by
payment
fulfilled.
Entries in
trust-books.

¹ Waddel, 15th Dec. 1842, 5 D. 309.

² Burnside, 10th June, 1829, 7 S. 735.

in a settlement by a grandfather, importing, that in the event of his grandchildren marrying without having first consulted his trustees, and obtained the consent of the majority of them, regularly entered in the sederunt-book appointed to be kept by them, and duly signed, the grandchildren so marrying should forfeit their provision under the settlement,— it was held, that as two of the trustees had verbally consented, and no dissent by the other two had been minuted, the omission of a signed consent in the sederunt-book did not occasion a forfeiture.¹

Effects of
non-accept-
tance by
trustees.

In trusts where interests are created in third parties, these interests cannot be affected by the non-acceptance of any trustee or trustees; and therefore, though all the trustees named in a trust-disposition should refuse to accept, an action would lie against them, at the instance of the beneficiary, to denude in favour of other trustees, where it is competent to appoint such; or where only some of the trustees have refused, then in favour of the accepting trustees under the trust, where it is competent for the trustees so limited in number to act. This point appears first to have been definitely settled in the case of a mortification for behoof of the schoolmaster of a parish;² and has since been invariably acted upon in all cases of trust for behoof of third parties. Thus, where a father *mortis causa*, disposed his effects to trustees *inter alia*, to invest a sum of money in security, in favour of certain parties in liferent, and the fee to their children,— it was held, that although the trustees declined to accept, and the provision had not been laid out as

¹ Grahame, 9th Feb. 1774, M. 2979.

² Campbell, Dec. 1752, Mor. 16203.

directed by the trust-deed, the fee vested in the children, whose right was not affected by the parent having betaken himself to the legitim.¹

In the case of trusts for creditors, most important consequences may attend delay in accepting by trustees. Thus, where a party, in a process of cessio, conveyed his whole property to two trustees, who, for more than twelve years, never took up or acted on the disposition — and the trustees having, after the date of the conveyance, used arrestment in the hands of the truster's debtor, — it was held, in a competition with a third party, founding on arrestment used in the hands of the same debtor, both prior and subsequent to the date of the trust-conveyance, that the trustees had no preferable right, and were barred from founding on the disposition in support of their claim to a preference.²

In the event of non-acceptance by trustees, the trust-property, as being *in hereditate jacente* of the truster, falls to be administered by his natural heir or heirs, or their guardians, where minors. Thus, where trustees failed to accept, and the daughters of the truster were served as heirs-portioners — and the eldest daughter brought an action of declarator to have it found and declared, that notwithstanding the non-acceptance of the trustees, the sole and exclusive right to the trust-estate belonged to her by trust-conveyance, — it was held, that the principal pursuers and defenders, under their service as heirs-portioners of line, held the estate under the several

¹ Ewan, 10th July, 1828, 6 S. 1125. See also Fraser, 2d Feb. 1810, Hume, 885, and cases there cited of Menzies, 1808, Lord Hyndford, 25th June, 1789.

² Young, 17th May, 1836, 14 S. 776.

or party
appointed by
Court.

What num-
ber of trustees
may act, fail-
ing, or in the
absence of the
rest.

General
practice.

interests created by the deed of settlement for the purpose of satisfying the same.¹ Where there is no natural heir, or the heir or heirs refuse to conduct the trust-affairs ; or where the trust is for a purpose requiring very special provisions for being carried into effect, as in a mortification—then the remedy lies in an application to the Court to supply the deficiency by the appointment of a judicial factor, or otherwise, as shall be found necessary.

Thus, the affect of acceptance by a limited number of trustees, nominated in a trust-deed, depends necessarily in a great measure on the particular terms of appointment under the deed, whether it be restricted as to numbers, or a general appointment merely. The course usually adopted in practice, is to nominate a certain number of trustees, and declare, that a certain fixed number, or a certain number of those accepting, shall be a quorum ; or to declare, that no act shall be done without the advice and consent of a certain one of their number, called a *sine quo non*. The most proper mode seems to be, to appoint a certain number to be a quorum.²

¹ Fraser, *ut sup.*

² In England, where the administration of the trust is vested in co-trustees, they all form, as it were, one collective trustee, and, therefore, must execute the duties of the office in their joint capacity. See *ex parte Griffin*, 2 Gl. and J. 116. The Court knows no such distinction as one of several trustees being called the *acting* trustee, all who accept being acting trustees. And if any one refuse to join, it is not competent for the others to proceed without him, and the administration will devolve upon the Court ; *Doyly v. Sherratt*, 2 Eq. Ca. Ab. 472, note to (d.) On the death of one trustee, the joint office survives, as being an authority coupled with an interest ; *Hudson v. Hudson*, Rep. t. Talb. 129, per Lord Talbot, Co. Lit. 118, a ; *Attorney-General v. Glegg*, Amb. 585, per Lord Hardwicke ; *Gwilliams v. Rowell*, Hard. 204 ; *Billingsley v. Mathew*, Toth. 168. And their survivorship exists, though there be a power of appointment of new trustees, which has not been exercised ; see *Doe v. Godwin*, 1 D. and R. 259 ; *Townsend v. Wilson*, 1 Ba. Ald. 608 ; *Hall v. Dewes*, Jac. 193 ; *Attorney-General v. Foyer*, 2 Vern. 748 ; *Attorney-General v. Lichfield*, 5 Ves. 825 ; unless the deed declare other-

As in all trusts for behoof of third parties, the interest of the beneficiaries is not to suffer by the lapsing of the nomination of trustees, any course adopted in regard to the conditions of the appointment of trustees, can only be a matter of expediency and convenience. So far as strictness of interpretation of actual intention will admit, the Courts of law will, on ordinary grounds of utility alone, always incline to support the efficacy of the trust, in accordance with the prevailing rule of non-interference with the conducting of trusts, unless in cases of actual necessity. The rule, therefore, has been, that where there is acceptance by such a number of those appointed, as is not inconsistent with the limitations in the deed, whilst, at the same time, security is obtained for the preservation of the estate, the Court will support the trust. Where, on the other hand, there are any good grounds for doubt as to the security of the estate, the Court will, as previously stated, interfere to provide for its safety.

The great difficulty necessarily is, to ascertain the exact point at which acceptance by a limited number of the trustees named in a deed shall be held sufficient; the simplest view of the question being, that under a general appointment of certain individuals to be trustees, either the whole of their number must accept, or, if that be not necessary, then in the event of any of them accepting, the trust must take effect; for there is no possibility, in such a case, of ascertaining any intermediate point at

wise; *Foley v. Wontner*, 2 Jac. and Walk. 245; and see *Jacob v. Lucas*, 1 Beav. 436. But there is little analogy between the English and Scotch law upon this subject, in consequence of the right of the cestuique trust to call for the appointment of a proper number of trustees, and of the power to do so existing in the Court. See *inf.* part 3, c. 9.

Conditions of
appointment
matter of
expediency
merely.

Tendency of
the law to
support these.

Limits as
regards suffi-
ciency of
acceptance.

*Joint-ap-
pointment;
a quorum;
sine qua non;
*sine quibus
non*, &c.*

which limited acceptance is to stop. The authorities generally go to shew, that where trustees are named jointly,¹ or where a quorum,² or *sine quo non*,³ or *sine quibus non*,⁴ are appointed — in any of these cases, non-acceptance, death, or incapacity, will defeat the nomination.

Exception.

But where certain parties were appointed trustees, the majority of whom to be a quorum, provided that the trustor's wife should be one of the number, and *sine qua non*, with a power to any surviving trustee to act, failing the others, — it was held, that if the widow had accepted, her consent as *sine qua non* would have been necessary in all the trust-actings; but that by the terms and conception of the deed, it did not appear to have been the intention of the grantor that her non-acceptance should dissolve the trust.⁵ It has been decided, and apparently on conclusive grounds, that

*Acceptance
by a quorum.*

where a trust is created, and a certain number declared a quorum, if a quorum accept, the trust is effectual.⁶ For a trust conferred on certain specified individuals, and the survivors of them, without saying, to the acceptors and survivors of them, cannot be held as limited to the event of the

*Conveyance
to trustees
and survivors.*

¹ Cunningham's Children, 13th Feb. 1624, M. 8047 ; Hepburn, 13th July, 1699, M. 7428 ; Dick, 22d Jan. 1758, M. 7446 ; Stodart, 30th June, 1812, F. ; Drummond, 17th Jan. 1671, M. 14694 ; Elleis, 14th Feb. 1672, M. 14695 ; Montrose, 27th Jan. 1688, M. 14697 ; Drumore, 24th Feb. and 16th June, 1742, M. 14703.

² Ramsay, 25th Jan. 1672, M. 14695 ; Aikenheads, 24th June, 1703, M. 14701 ; Blair, 14th Feb. 1735, M. 14702 ; Stodart, *ut sup.* ; Drumore, *ut sup.* ; Campbell, 26th June, 1752, M. 14703. See also cases of Watt, 10th Dec. 1692, M. 14700 ; Callender, 23d Feb. 1693, M. 14701 ; Turnbull, 11th Feb. 1676, M. 9162.

³ Aikenheads, *ut sup.* ; Blair, *ut sup.* ; Drumore, *ut sup.*

⁴ Montrose, *ut sup.*

⁵ Forbes, 2d Feb. 2808, M. solidum et pro rata, App. 3.

⁶ Halley, 20th Feb. 1840, 2 D. 623.

whole parties nominated accepting of the trust ; the interest vested in third parties excludes the application of such a limitation, which is only properly applicable to the case of mandates or ordinary business trusts, and places them in a position similar to that of *mortis causa* dispositions, and tutors and curators, where the power cannot return to the truster, or party constituting.¹ Where there is a clear limitation pointed out by the truster, it is evident, that if there be such a number of accepting trustees as was declared sufficient for carrying on the business of the trust, the others must be held as in a great measure appointed for security against its falling from refusal to accept ; and that therefore there can be no reasonable grounds for exception to the competency of the trust under the terms of the deed itself, or as not being consistent with its limitations. This is quite a different question from that, for instance, as to a power of appointment or substitution of trustees ; there the intention is *ex facie* the reverse, the *delectus personæ* is a bar ; whereas here the trust or *delectus personæ* is exercised, and therefore a special provision as to the number of trustees is not to be stringently enforced to the defeating of the truster's own intention, because in existing circumstances defectively expressed. In the absence of any more definite indication of intention, these must come under the first general rule as to special powers, that where expressed in general terms, they are to be liberally interpreted as regards the execution of the trust ;² for although conditional in one respect, as in demanding a certain

General rule.

¹ Campbell, 26th June, 1752, M. 14708.

² See *sup.* page 147. See also Campbell, *infra*.

Presumption
as to general
appointment.

number to transact the business, it may be general in other respects. The only specific inference which indeed, can be drawn as to a general appointment is, that the fact of the trustor's having appointed a number of trustees, shews that he did not intend to place his estate in the hands of one or more, but of several individuals, upon which ground the Court proceeds in demanding caution in certain cases where trustees have failed. Were much latitude given to such subtlety in matters of this kind, trusts must come, in innumerable instances, from unforeseen changes, to be placed on a footing of uncertainty, which could only give insecurity to important appointments, without, on the other hand, by legal disquisition and investigation, leading in any way to establish principles of general value.

Analogy of
cases of admini-
stration.

The cases of non-acceptance and failure of trustees seem precisely similar in principle and effect ; but it seems at least a doubtful matter to hold, that the parallel cases of administration are of authority in the present question. It has been decided in regard to these cases, that a majority of trustees under an indefinite nomination, are entitled to act in the necessary absence of the others.¹ And where a majority of the trustees under a marriage-contract were declared a quorum,— it was held, in an action in which two of the trustees entered appearance as defenders, that a majority of the remainder, although not a majority of the whole trustees, were entitled to pursue.² But there is an important distinction as to acceptance, which is an element in the constitution of trusts, and the powers and actings of trustees

¹ Campbell, 12th June, 1824, 3 S. 126.

² Shanks, 4th March, 1830, 8 Shaw, 639.

after acceptance; for the acceptance is in some degree equivalent to the constitution of a quorum, inasmuch as the majority of the acceptors constitutes a quorum for carrying on business, without regard to the number contained in the original nomination; but if one be named *sine quo non*, he must necessarily be one of the acceptors. The question now under consideration is therefore *a priori* to these cases of administration. In an old case, however,¹ it was held, that there was no "material difference" between these cases; but the Court, at the same time, in respect of the circumstances, burdened them with finding caution. Thus, in the analogous cases ^{Tutors and curators.} of tutors and curators, it is a fully established point, by a train of decisions, that in an indefinite appointment of parties, the appointment does not fail, although only a limited number of those named shall accept. These cases apply to a variety of circumstances. Thus, where A and B were appointed tutors, without expressing them to be joint tutors, though one of them should not accept, the office would subsist in the person of the other; for to make a joint nomination, such must be specially expressed.² And where two parties were appointed tutors and curators, and failing them, certain others, any two of whom to be a quorum, and one of the two first named died,—it was held, that the nomination of the first tutory and curatory had not failed by the death of one of the two parties named, and the office therefore had not devolved on those named to take the office failing them.³

¹ Callender, 23d Feb. 1693, M. 14701.

² Young, 7th Nov. 1740, M. 16346.

³ Fisher, 2d Aug. 1758, M. 16361.

And, also, where five tutors were named, without mention that they were appointed conjunctly and severally, or specifying a quorum, and two only acted, these two were held entitled to do so.¹ Where three persons were nominated, *ex officio*, as a board for the nomination of candidates for a bursary, but no quorum was appointed,—it was held, that where the office of one of them was vacant for the time, the other two might act.² And even where three persons had been appointed, and two accepted, and assumed the trust, without giving notice to the third that he was appointed, the actings of those accepting were held to be competent.³ These authorities bear as much on the present question as any in which the exact circumstances or offices are not identical can do; the principle applicable to both is the same; the right of property vested in the parties may differ, and the duties of their offices may in some degree differ also; but the principles on which the intention of parties placing confidence in others are to be judged of, is the same in both. The grounds adopted, in the decision in the Court of Session, and the reversal by the House of Lords, in the case of *Stewart v. Baikie*;⁴ where it was held, that by the death of one of three tutors dative, the tutory fell, are consistent with the view now taken, and, indeed, confirm it, in so far as they bear upon it; but that was a case of tutory dative in which, being a nomination by the Crown, there could be no *delectus personæ*, and, therefore,

¹ *Elleis*, 14th Feb. 1672, M. 14695.

² *Macantyre*, 12th June, 1824, F.

³ *Grant*, 11th July, 1764, M. 14690.

⁴ 7 W. S. 211, reversing 28th Jan. 1829, 7 S. 330; see also *Trail*, 21st June, 1821, 1 S. 78.

quite distinct from private trusts ; and if applicable in any way to the present case, can only be similar to that of substituted trustees, or to judicial factors, and curators bonis.¹

¹ With regard to the proper number of trustees to be appointed by trust-deeds, the following observations of Mr Lewin, Treatise on the Law of Trusts, p. 82, are well worthy of being attended to :— “ We may here add, that the proper number of trustees is a point very material to be considered, for in nine cases out of ten, the misapplication of the trust-fund has arisen from want of due attention to this particular. A single trustee, whether originally appointed such, or become so by survivorship, has the absolute and unlimited control over the property ; and should he become involved in difficulties, he is under a strong temptation to sustain his credit by resorting to a fund of which he can with certainty possess himself, and without the fear of immediate detection. The fallacious hope of replacing the money before the day of payment arrives, has lulled the consciences of many, not the worst of mankind, when suffering under the pressure of poverty. There can be no objection to the appointment of a single trustee, where, as in uses to bar dower, the trust reposed in him is merely a nominal confidence ; but where the administration of the trust involves the receipt and custody of money, the safeguard of at least two ought never to be dispensed with ; and on the death of one of the original trustees, no time should be lost in restoring the fund to its proper security by the substitution of a new trustee—a precaution, it is feared, but too frequently neglected from motives of delicacy ; the surviving trustee is sensitive, and conceives his honesty is called into question, and the cestuique trust, often too ignorant of the world to see the necessity of taking precautions against fraud, are apt to suspect their legal adviser of a wish to create business at the expense of the estate. To guard against the constant occurrence of appointment of new trustees, it is common, at least where the property is considerable, to appoint four trustees originally ; for then, on the decease of the first, or even a second trustee, an immediate substitution is not very material, for so long as the plural number remains, the necessary check is preserved.” To this it may be added, that the confidence to be reposed in trustees ought to be reposed in them as a body ; and that no preference should be given to any one or more of their number, as by the appointment of a *sine quo non*, or of *sine quibus non* ; for such preferences, or rather restrictions, are an anomaly in trusts, and at variance with their true character, namely, that of reliance on the superintendence, not of one party merely, but of several. And moreover, such interference with the proper constitution of a trust must be a very sufficient ground of refusal to accept, by those whom it is proposed to place in a subsidiary position, in a matter of confidence such as the gratuitous and friendly office of trustee. There is a distinction, however, in the case of trusts of extrajudicial settlements of bankrupt estates ; the usual and proper course is to appoint a professional trustee, who is alone responsible—the duties of such office being more properly that of a factor or agent than a mere private trustee. In all other trusts, the trustees ought to be mere overseers, not office-holders, whose chief

**Provision as
to heirs going
abroad.**

It ought to be specially provided in every trust-deed, that so far as regards the conducting of the trust-affairs, those only shall be considered as trustees who are, for the time being, within the kingdom of Scotland; such a provision will prevent the inconvenience which arises from the absence of trustees, and questions as to the competency of acts done in their absence.

**Remedy in
the case of
failure of
trustees.**

**Power of the
Court to
substitute
trustees.**

Where the office of trustee has lapsed before the trust-purposes have been completed, no power of substitution being given by the deed, the remedy is by application to the courts of justice to supply the defect, in virtue of the *nobile officium* of the Court. There are a variety of cases in which it is necessary to apply to the Court for the purpose of having a responsible person appointed to manage an estate: as in questions of disputed title or right of succession, in the case of an heir, who, during the *annus deliberandi*, is considering as to whether he will enter heir or not; where a succession has fallen to a person who is resident abroad, &c. In all such cases, it has been usual for the Court to appoint a person simply to manage the estate, under special powers conferred by itself, and not by any general power of administration or trust vesting the property in such party, who is termed judicial factor, curator bonis, &c.

**Question as
to substitu-
tion of
trustees.**

Where a provision has been made for the conducting of the affairs of an estate, and the manner in which it is to be so, and purposes to which it is to be applied, have been clearly stated by a trust-

duty ought to be to determine and direct, and make the annual rendering of accounts an indispensable requisite, and not personally to conduct ordinary details.

deed, but a defect has arisen, from the want of a proper provision as to the continuance of the management, or from the party appointed having become disqualified, the question comes to be, whether the Court will, with the view of carrying the intention of the trust into effect, and in virtue of its *nobile officium*, appoint a new trustee, or new trustees, to do so; or, whether the Court will, on the ground, that, in all cases of trust, there is a *delectus personæ*, either direct or provisional, appoint a factor, as in other cases, with special instructions to fulfil the purposes of the trust in question, the necessary powers being given according to the circumstances of each case. In the case of Preston's ^{Affirmative held.} Trustees *v.* Preston,¹ where all the trustees, under a settlement giving large powers and privileges, refused to accept, the Court, with express consent of parties interested in the succession, appointed trustees, with the whole powers and privileges of those named in the trust-deed. One of the parties so consenting having objected that the Court had no power to make such an appointment of a trustee,—it was held, that the Court had such power, both in virtue of the inherent authority in the Court, and also, in virtue of the consent of the parties interested. This question was raised on appeal in the same case, but it was held unnecessary to decide it, as the appointment stood in full force, having been with the consent of the party objecting.² The question, as to the power of the Court, was not very fully before it, in this case, but still a very decided opinion appears to have been stated by the Judges. This

¹ 8th Feb. 1838, 16 S. 457.

² 29th March, 1841, 2 Robin. Ap. 45.

Question
still open.

case, however, can by no means be held as deciding the question, the procedure in it having been somewhat peculiar, and by no means in accordance with the generally understood and established principles applicable to such cases.¹ For if the Court went the length of holding, that they could appoint trustees, with the full powers as conveyed by the trust-deed in question, they must have held it competent to confer powers of a most extensive and discretionary nature; the discretion of those appointed or substituted by a power under this trust being of such a nature in some important respects. This, as a question of legal polity, could not be affected by the consent of parties interested, such a course is inconsistent with the principles and established rules of law, and amounts to a mere evasion of them. Caution was demanded, in this case, from those appointed by the Court. But if the sound principle be, that the Court cannot appoint a trustee, in the proper sense of the word, that is characterized by certain confidences of a special nature, and peculiar to that office, mere security against mal-administration, and for the general safety of the property placed under their control, cannot supersede the difficulty, but must be a mere evasion of it. That such appointments are incompetent is very evident from the authorities on this subject. It is an undoubted rule of law, that the Court cannot transfer discretionary powers, such being identified with the party, and, in fact, taking their rise in the *delectus personæ* applicable to a special party.² As,

¹ I am informed, that at the period of appointment in this case, the question was by no means fully taken into consideration by the Court.

² Dick, 22d Jan. 1758, Mor. 16206, and 7446; Ireland, 18th May, 1833, 11 S. 626; Campbell, 22d Dec. 1739, M. 674. See *s.v.p.* page 134.

except in cases of trust with discretionary powers, the non-acceptance or failure of trustees cannot affect the interests created by the trust, it appears to be of little importance, as regards the powers of the Court, whether the question shall arise as to non-acceptance or failure of trustees, the general principle being apparently a matter independent of such distinctions, which, however, afford illustrations of the general rules adopted by the Court under various circumstances. In the case of the King's College of Aberdeen, where a sum was bequeathed for maintaining bursars, to be secured by the direction of certain trustees, and of them some would not, or could not, accept, or were abroad in foreign parts, and the executors wanted to pay the money, and the masters of the College prayed the Court for a warrant to them to uplift and secure it ; it appears to have at first been held,¹ that the Court came in the place of the trustees ; but it was afterwards held,² that the trust did not devolve upon the Court, but upon the Crown ; but that, if the money were consigned, the Court must not let it lie dead, but order it to be laid out upon interest. The Court, therefore, granted the warrant prayed for, the petitioners giving their bond, obliging, not them and their successors in office, in terms of the petition, but them and their own heirs, conjunctly and severally, to report to the Court, in six months, the security taken by them for the money, to be recorded in the books of Session. In the case of *Campbell v. Campbell*,³ in which it appears first to have

Tendency of authorities.

¹ 27th Jan. 1741, Elch. Jurisdiction, 21.

² 23d Feb. 1741, Elch. Trust, No. 11. See also Hospital of Largo, 15th July, 1680, M. 14722.

³ 26th June, 1752, M. 7440 ; Dec. 1752, M. 16203.

been properly decided, that the beneficiary right in a trust does not fall by the non-acceptance of the trustees, the Court declared, that in the event of the whole trustees refusing to accept, it would name administrators. In the case of forfeiture, the trust right devolves upon the Crown for the uses contained in the deed.¹ Where trustees were removed as suspected, and all interested petitioned the Court, that they would, *ex nobili officio*, appoint another trustee to denude the former and bring them to account; the Court declined to do so, but nominated a person factor loco tutoris, with the usual powers, and especially with power to bring a proper process for denuding the trustees, if he should be so advised.² So, also, where an only surviving trustee had become bankrupt, and an action was brought to oblige him to convey the estate to a party to be named by the Court, the trust-estate being very much encumbered, so that the extensive powers, as given by the deed, were necessary for its management; it was observed by the Court, that, at an early period, the Judges in the Court of Session had exercised very extensive powers in supplying the defects of family settlements and trust rights, as well as by giving particular instructions to those who had been named by them for managing the estates of persons under age, or labouring under temporary disabilities; but that, of late, much more caution had been used, and now, it was only in the case of trusts created by statute, or where, as in estates destined to charitable uses, no person had any immediate interest in the manage-

¹ M'Kenzie, 12th Feb. 1736, Elch. Trust, No. 4.

² Wotherspoon, 15th Dec. 1775, M. 7450, and 16372.

ment, that the Court would interpose in this manner, and therefore found the trust at an end.¹ And again, where the trustee by a family settlement had failed, the Court refused to name a trustee, but, upon application from the parties, they named a curator bonis, with the usual powers.² Where a trust was in favour of a certain party, his heirs and assignees, and the party so named had been infest, and died, but his heirs refused to act, and in consequence of two of the parties interested in the deed being abroad, so that their concurrence in the appointment of a new trustee could not be obtained without delay, all the other parties interested in the deed applied to the Court to nominate a new trustee; the Court refused to do so, but granted an amended prayer, which prayed the appointment of a factor upon the estate, with powers to take all steps necessary for investing himself therein, in order to execute the purposes of the trust, a majority of their Lordships being of opinion, that although, in cases where there was an absolute necessity for their interference, the Court would appoint a trustee, there did not exist such necessity here.³ Where a trust had fallen by the death of a trustee, who had made considerable advances in the course of the management, and who, under the trust, would have been entitled to retain the trust-estate till relieved of these,—the Court, on the application of his widow and executrix, appointed a judicial factor to carry on the trust, notwithstanding the opposition of a creditor infest, it being observed by the Court, that “although, when a trust

¹ McDowall, 20th Nov. 1789, M. 7453.

² Grant, &c., 13th Feb. and 2d March, 1790, M. 7454.

³ Moir, &c., 6th July, 1826, 4 S. 801.

has fallen, we will not nominate trustees, it is competent for us to appoint a judicial factor to manage the trust-estate."¹ Where an only surviving trustee applied to the Court to name a factor, and to grant power to make up titles to an heritable debt, and certain other heritable subjects, the Court named a factor; but before conferring the powers required, ordained the petitioner to give in a minute, pointing out the decided cases where the Court granted the special power and authority craved in the petition.² Even where a trust was created in favour of certain parties, whom failing, to any person to be named by the Court of Session, the Court, on the failure of the individual trustee, appointed a factor to execute the trust according to the powers therein conferred, refusing to grant any special authority as to making up titles or otherwise.³ Where a trust had been created for the purpose of erecting and supporting certain schools, and several of the trustees having died, the rest applied to the Court to appoint additional trustees, and produced lists containing the names of the representatives of the original trustees, and certain official persons whom they wished to be nominated, and on whom, and their successors, the administration of the trust should permanently devolve, the Court refused *in hoc statu*.⁴ And on the failure of the trustees under a mortification, the Court appointed a kirk-session factors to execute the trust, refusing, however, specially to find them entitled to make an allowance to their clerk for

¹ Burnett, 24th Jan. 1829, 7 S. 314.

² Busby, 1st Feb. 1823, 2 S. 176.

³ Robertson, 7th Feb. 1833, 11 S. 365; see also Harvey, 7th July, 1836, 14 S. 1112; Alexander, 27th Feb. 1824, 2 S. 745; Douglas, 14th Dec. 1839, 2 D. 238.

⁴ Marjoribanks, 27th Feb. 1822, 1 S. 355.

management, leaving them to act in that as in other matters, according to the rules of law.¹ So, also, where a trust had been created for the purpose, amongst others, of supporting a dissenting preacher or preachers of a certain persuasion, or other religious purposes in certain circumstances — and there having ceased to be a quorum of trustees in terms of the deed — and the remaining trustees having applied for exoneration, and the appointment of the office-bearers of certain permanent bodies to carry the trust into execution — the Court refused to appoint new trustees, but appointed a judicial factor with the usual powers.² Where a party who executed a trust-deed and settlement for the distribution of his estate, and conferred no discretionary powers on the trustees as to the proportions or mode of such distribution, was predeceased by the trustees named in the settlement, and executed no new nomination, on the petition of parties interested in the settlement, the Court appointed a judicial factor with the usual powers, to realize and manage the estate, and to implement the ends and purposes of the disposition and settlement.³ The practice of the Court in these varied cases, clearly shews, that it has not, unless in very special circumstances, taken upon itself the appointment of trustees, that is to say, reposed in any one that implicit confidence, or rather the proprietary power, which is implied in a grant of trust by a private party. Accordingly, in the case of M'Aslan and others,⁴ the whole trustees named in

Practice un-favourable to appointment.

¹ Falconer, 4th Dec. 1830, 9 S. 142.

² Ireland, 18th May, 1833, 11 S. 626.

³ Cairns, 19th Jan. 1838, 16 S. 335.

⁴ 17th July, 1841, 3 D. 1263.

the settlement, which contained a power of sale, having died,—the Court, on the application, or with the consent of all the parties beneficially interested, appointed trustees with the whole powers contained in the settlement, but under the condition of their finding caution in terms of the act of sederunt anent factors ; thus shewing, that the said trustees were appointed in the character of factors, subject to the rules regarding them, and in this respect, and in so far as they held the character of trustees, doing so only in virtue of the consent of parties, as in the case of Preston. That the appointment of trustees by the Court is at variance with the established principles and practice of the law, is evident from the subsequent but *ex parte* case of Menzies,¹ where the Court held, (notwithstanding the case of Preston, which was referred to by one of their Lordships,) that it was incompetent. Indeed, it is a difficult, if not an impossible matter, to lay down any positive rule as to such appointments by the Court. It is plain that it can seldom, if ever, be safe or advantageous for the Court to appoint actual trustees ; each case must in a great measure depend on its own particular necessities, which may in general be provided for by a more limited authority or amount of discretion, than might be given in a case of individual confidence.

As we have already seen, discretionary powers cannot be transferred by authority of the Court ; as, for instance, powers of determination as to the amount of individual interests in the residuary fund, or of

¹ 11th March, 1840, S. J. From this it would appear, that under a petition for the appointment of a trustee, the Court cannot appoint a factor. Such petition ought therefore to be alternative, or for a factor only.

carrying on trade or manufactures, or selling the property, or a part of it, if judged proper by the appointed trustee. And it comes to be a difficult question what is to be done in the case of mortifications, or other charitable bequests, &c., where such discretionary powers are usually given, and in many cases form the chief character of the trust. As has already been observed,¹ where no discretionary powers are given, a mortification forms perhaps a more favourable case than any other for the appointment of parties with extensive powers of acting in the character of trustees or managers.

Powers under
mortifica-
tions.

The only case in which the subject of appointment of trustees by authority of the Court appears to have been brought under the consideration of the House of Lords, is in that of *Miller v. Black's Trustees*.² In that case, which was one of a bequest for charitable purposes, it was observed by Lord Brougham, (*obiter*,) "It might be enough to look at the part of the deed immediately following the charitable gift, providing that the trustees named shall execute the conveyances to those whom they are empowered to assume into the trust, with the same powers, for the purposes herein written. Now, among these is that of assuming others to fill up the vacancies by death or declining to act; and though the trustees are only empowered to assume on, vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it, even if they altogether decline themselves. But there is a sufficient power in the Court of Session to provide for continuing the trust in a case of this description, had

¹ *Sap.* page 174.

² 14th July, 1887, 2 S. M. 889.

there been no such clause. It is unnecessary to inquire what power the Court has, or what it is in use to exercise, in the case of private trusts becoming defective by death or non-acceptance, although the cases of Busby, in 2 S. and D. (176;) of Christie, in 5 S. (293;) and still more precisely that of Moir, in 4 S. (801)—cases as late as 1825 and 1826—appear to leave no doubt, that in one way or another, the Court will prevent the failure of a testator's or disponer's intention for want of trustees: and to this proposition of course those cases are no kind of exception, in which the Court refused to interfere where the property was given to the heir or other person, upon the trustees dying, or refusing to act, as Macdowall *v.* Macdowall, in Mor. 7454—a case which, as I stated during the argument, came precisely within the principle which ought to govern the exercise of the power of supplying a trust,—that if a trustee dies, or refuses the trust, where it is quite clear that the intention of the testator was, that in such an event, the heir should take the estate, discharged from any trust, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee; for that is the very event provided for, the gift going over and the trust ceasing. I apprehend, (though it is unnecessary to dispose of that question,) that this gift cannot be considered as being in the predicament in which it was contended at the bar to be, namely, that though there is a most distinct constitution of a trust, yet no mention being made of heirs, executors, and administrators, if one of the trustees refused to act, so that the quorum no longer existed, or if they all refused to act, or all

died, the Court had no power to give effect to the testator's intention—an argument which would require a much stronger case to support it than any produced at the bar. But it is unnecessary to enter upon that consideration, for in the present case there is no question whatever. The case of *Macdowall v. Macdowall* clearly shews, without deciding how the Court would act in the case of a private trust,¹ that without any doubt, the Court will interpose,—(I am now reading the words of the Judges in that case, which occurred in 1789, when, if at any time, the bench of Scotland was filled by accomplished lawyers, thoroughly versed, not only in the principles, but in the practice of the law of Scotland, and therefore is of high authority)—“the Court will interpose,” as it is said, “where no person has any immediate interest in the management;” and estates destined to charitable uses are expressly given by their Lordships as an instance. On this point I have rather referred to the cases, and especially the more recent ones, than even to the highly respectable authority of Mr Erskine in the 3d book of his Institutes, because, certainly, in former times the Court of Session was in use to go farther in supplying defects in trusts than its later practice appears to warrant.”

In an old case,² where an action of declarator was brought against heirs of entail, to have it found, that a nomination of trustees to appoint provisions to wives and children, out of an entailed estate, having

¹ It must be observed, with regard to the term *private trusts*, as used by his Lordship, that it is used in contradistinction to public trusts; trusts for charitable purposes being public trusts by the law of England, whereas in Scotland such trusts are mere private trusts. This would seem to make a restrictive distinction with regard to the latter.

² Hepburn, 13th July, 1699, M. 7428.

failed by their death, the Court should nominate a new set of trustees, or themselves appoint provisions. there was much difference of opinion as to whether the only remedy was not to take the term provided by law, and to leave the children to the economy of successive heirs of entail ; or whether the Court had not power to supply the accidental failure, not by a new nomination, but by the settlement of a reasonable provision ; and this being the opinion of the majority, a condescendence was ordered to supply the proper data. Although the course adopted in this case has been overruled by the subsequent practice of the Court, as alluded to above, still it affords this illustration, that if the Court were to take upon it to execute such power, it is evident, that it could only do so by thus declaring and awarding the beneficiary interests referred to ; as it is evident, that it could not confer upon any party, by delegation, powers so materially affecting patrimonial interests, such powers being inconsistent with the nature of the office of judicial factor.

Rules of law
of England as
to appoint-
ment of trust-
tees by Court.

The law of England undoubtedly allows greater latitude in regard to the interference of the courts in matters of trust than is acknowledged in the law of Scotland. But still, as regards this subject, it makes an important distinction ; for this arises in a considerable degree from the nature of chancery jurisdiction, which renders the classification of parties of a much more varied character under the denomination of trustees, than in strictness of legal term ought to be so classed, as, for instance, the most ordinary cases of contract ; yet it very properly, and for the most evident reasons, distinguishes between the amount of trust conveyed by the deed according

to the rules of powers ; and, therefore, where a new trustee is appointed by the Court, the conveyance from the old trustee to the new trustee has not the effect of communicating any special power.¹ So that in effect, the practice of the Court of Chancery does not differ from that of the Court of Session ; either of them will confer the confidence applicable to the office of a manager or factor, but not of a trustee ; or, in other words, will confer a trust, but not a power ; the powers in nature of trusts to be so conferred, therefore, being, as distinguished from conditional, of that class which have been distinguished as unconditional special powers.² And moreover, it must be observed, that in England there is no office which is properly equivalent to that of judicial factor in Scotland — an office in every way so much better suited for the conducting of trusts under the direction of the Court than that of trustee, and which ought never to be confounded with it.

It is an important matter in many cases to determine what amount of special powers contained in a trust-deed can be conferred by the Court upon a factor appointed by it to manage the affairs of the trust in room of the trustee ; for there are frequently powers contained in trust-deeds, which, although not purely discretionary, imply an amount of confidence which is not applicable to the character of a mere judicial factor. Where the trustor specially states certain purposes to be done which require mere skill for their accomplishment, extensive powers may undoubtedly be so given ; and if necessary, authority

Amount of
power con-
ferred on
judicial
factor.

¹ Doyley v. Attorney-General, 2 Eq. Ca. Ab. 194 ; and see Cole v. Wade, 16 Ves. 44, 47 ; Hibbard v. Lambe, Amb. 389 ; and see L. on T. 424.

² See *sup.* page 147.

to take feudal investiture, if such shall prove indispensable during the execution of the duties of his office. But where the exercise of discretion is evidently required, or necessary, a court of law will hesitate to confer such on a mere manager, notwithstanding the existence of a trust-deed; for such a party is either a factor, with the ordinary powers implied by that office, or attached to it by law; or he comes under the special confidence conferred by the deed, and is therefore in effect a trustee. Such distinctions are matters for the consideration of the Court in the circumstances of each individual case.¹

*Power of the
Court in Scot-
land to super-
intend and
remove
trustees.*

Although the Court will not interfere with the management of trust-estates by those appointed by trust-deeds, unless in cases of absolute necessity, yet it will do so where necessary to carry the purposes of the trust into effect, and preserve the estate. It will, therefore, suspend the acting of trustees, or remove them from their office, if necessary.² Thus, where the heir disputed the title, and interfered with the possession of trustees, who were infest in the trust-estate, the Court awarded sequestration of the rents upon the application of the trustees, although opposed by the heir, who had brought an action of reduction of the trust-deed.³ Where a trustee died during the dependence of a process of multiple-poinding, which was raised by him to obtain exoneration of the trust-estate — and a litigation arose as to the right of a party to be sisted in that process as trustee under a deed of assumption, — the Court, at the instance of claimants on the fund *in medio*, sequestered the trust-estate, in respect the

¹ See *sup.* part 2, c. 1.

² *Ibid.*

³ Earl of Hyndford, 5th Dec. 1669, M. 14347.

*Sequestration
of trust-estate.
Disputed title
of trustees.*

party never had possession; and they appointed a judicial factor on the estate, with power to appear and defend the interests of the trust in the aforesaid process, and with all other usual powers.¹ Where two parties contended for the office of trustee on a land-estate, under a private settlement, and the party having the beneficiary interest under the trust disputed the right of both competitors, the Court, in the meantime, sequestered the rents of the estate, and made an interim appointment of a judicial factor;² which sequestration it refused to recall on a petition at the instance of a party claiming right to act as trustee under a deed of assumption, which was under challenge, and whose interests as an individual were conflicting with what would be his duty as a trustee.³ Where trustees appointed by trust-deed were equally divided as to the administration of the estate, the Court, with the consent of one of the trustees who was named factor by the trust-deed, appointed a judicial factor.⁴ Where the last surviving partner of a trading company appointed trustees having a small interest as his legatees, and these trustees assumed the management, they were removed, and a judicial factor appointed by the Court, on the application of creditors to a large amount.⁵ And where trustees with powers of sale refused to accept, and the beneficiaries disagreed as to the management, the Court interfered at the instance of one of the parties; and in respect they were not agreed in recommending the party to be appointed judicial

Disagreement
as to adminis-
tration.

Partnership.

Non-accep-
tance by
trustees.

¹ Christy, 10th July, 1834, 12 S. 916.

² Home, 7th March, 1833, 11 S. 588.

³ Hunter, 7th Feb. 1834, 12 S. 406.

⁴ Adie, 19th Dec. 1835, 14 S. 185.

⁵ Dixon, 22d Dec. 1831, 10 S. 178; Fullerton, 19th June, 1834, 12 S. 750.

Trusts for creditors. factor, remitted to the sheriff-clerk of the county to name the factor.¹ This power of interference by the Court does not, however, apply to the case of trusts for creditors.² The appointment of a curator bonis to a party insane, who has previously granted a trust-deed for behoof of his creditors, does not prejudge any question, either as to the validity of the existing trust-deed, or the rights created by it.³

Appointment does not prejudge.

Power to authorize application of funds. As the Court has the power of interpreting the intention of the trustees, and of determining questions of succession resulting therefrom, so also it has the power of authorizing the application of funds under doubtful circumstances as regards a question of fact. Thus, in the case of a party who is a beneficiary under a trust-deed being presumed, though not proved to be dead, it may authorize payment to be made to the heir or successor of the absent party, caution to repeat in the event of his reappearance always being found by such heir or successor.⁴ Thus, also, the Court allowed a party to receive the rents of a trust-property, the destination to which carried it to him, failing issue of his own body, there being no issue in existence; caution being found to repeat in the event of issue.⁵

¹ Harvey, 28th June, 1839, 1 D. 1137.

² See part 3, c. 8.

³ Dalrymple, 25th June, 1836, 14 S. 1011.

⁴ See Campbell, 17th June, 1824, 3 S. 145; Fettes, 7th July, 1825, 4 S. 149; Hyllop, 15th June, 1830, 8 S. 919.

⁵ Blackwood, 11th June, 1833, 11 S. 699.

CHAPTER V.

DUTIES OF TRUSTEES IN PRIVATE TRUSTS.

THE general rule regarding the duties of trustees ^{General rule.} is, that they shall bestow as much attention upon the affairs of the trust, as they might reasonably be expected to pay to their own affairs, and no more.¹

There are a variety of duties and rules applicable ^{Instructions.} to trusts generally. Trustees are bound in all trusts for family purposes not amounting to an irrevocable conveyance for behoof of third parties, to obey all instructions duly communicated to them, not only by the trust-deed, but also all instructions as to administration subsequently communicated to them by the trustor in any probative writing.² For example, where a woman had been supported by a man and his wife for fourteen years, succeeded to funds, and died after executing a trust, by which she ordained the trustees to pay all debts for which she was bound in law or equity, or in conscience — and addressed a letter to them expressing a wish that the wife should be allowed £.20 yearly for the said fourteen years, in full of board, lodging, and clothes, — it was held, that the trustees were bound to pay that sum.³

¹ Morley v. Morley, 2 Ch. Ca. 2, per Lord Nottingham; Jones, r. Lewis, 2 Ves. 241, per Lord Hardwicke; Massey v. Banner, 1 Jac. and Walk. 247, per Lord Eldon; Attorney-General v. Dixie, 13 Ves. 534, per eundem.

² See *sup.* p. 24.

³ Easton, 17th Jan. 1822, 1 S. 244.

Effect of acceptance.
Must fulfil duties.

Must concur,
or adopt legal
measures.

A party, after accepting of the office of trustee, is bound to fulfil the duties thereby incurred;¹ and when he admits the trust, as by pleading it in process, he is not entitled to disclaim in prejudice of the trust.² So, also, where property is conveyed in trust by a Scotch deed, the trustee is bound to fulfil that, notwithstanding any question of international law which may arise as to the trustee being resident in England, or otherwise.³ And where he is one of several accepting trustees, he is bound to concur with the others in all reasonable and proper acts of administration, as in uplifting the trust-funds for the purpose of making a loan which a majority of the acting trustees shall consider necessary, although he disapprove of the loan or other introduction in question; he is likewise bound to concur in granting proper discharges. The only ground on which he can properly refuse his concurrence is incompetency; for in questions of opinion in regard to competent acts of administration, he must be guided by the majority; the office is voluntarily assumed, and, as in the case of copartnery, &c. he must run the risks, if risks there be in so doing, not covered by the terms of the deed, which those acting along with him likewise incur; otherwise he would in effect be making himself a *sine quo non*. The proper course in such a case, where he considers the measures adopted to be improper or incompetent, is to apply to the Court.⁴ If he fail to do so, it will not

¹ Darling, 24th Feb. 1837, 15 S. 672.

² Ruthven, 19th Feb. 1663, M. 16164.

³ Blackett, 20th May, 1832, 10 S. 590.

⁴ In England, if a breach of trust be threatened, the trustee is bound to prevent it by obtaining an injunction; *In re Chertsey Market*, 6 Price, 279; and if a breach of trust has been already committed, to file a bill for the

do at a future time to complain of the course adopted by his co-trustees, and assert that he disagreed with them in regard to it.¹ Nor is a trustee whose consent is necessary to the completion of an act, entitled in any case to object to its being done, on the ground that he had not interposed his consent and authority, if he shall have been aware at the time of its being done, and shall have done any act to shew that he was aware, and if he had it in his power to have objected, and by legal means prevented it.² Nor is a trustee who has taken infestment under a trust entitled to withhold his name from proceedings necessary to the winding up, and obtaining the trustees denuded.³

The general rule is, that trustees shall fulfil the literal and precise conditions and directions contained in the trust-deed, and shall not do it by an equivalent. But they may fulfil their obligations by an equivalent where they do not injure the interest of the truster, where his is the interest in question. Thus, where a trustee in a comprising being obliged, in the event of a disposition of the lands, to take the

Fulfilng of
duties by
equivalents.

restoration of the trust-fund to its proper condition ; *Franco v. Franco*, 3 Ves. 75 ; *Earl Powlet v. Herbert*, 1 Ves. jun. 297 ; or at least to take such other active measures as, with due regard to all the circumstances of the case, may be considered prudent. See *Walker v. Symonds*, 3 Sw. 71.

¹ Lord Lyndoch, 15th Feb. 1827, 5 S. 358, Aff. 7th July, 1830, 4 W. S. 148 ; Do. 20th Nov. 1832, 11 S. 60 ; Logan, 26th May, 1843, 5 S. 1066. So, in England, if one trustee be cognizant of a breach of trust committed by another, and either industriously conceal it, *Boardman v. Mosman*, 1 B. C. C. 68, or do not take active measures for the protection of the cestuique trust's interest, he will himself become responsible for the mischievous consequences of the act ; *Brice v. Stokes*, 11 Ves. 319 ; and see *Walker v. Symonds*, 3 Sw. 41 ; *Oliver v. Court*, 8 Price, 166 ; *In re Chertsey Market, &c. sup.* ; *Attorney-General v. Holland*, 2 Y. and C. 699 ; *Booth v. Booth*, 1 Beav. 125 ; *Williams v. Nixon*, 2 Beav. 472.

² *Brisbane's Trustees*, 3d Feb. 1826, 4 S. 422.

³ *Cumming*, 28th Feb. 1834, 12 S. 508.

consent of the giver in trust, yet disposing to the common debtor, and paying the whole sums, principal, and annual-rent, and expenses, to the granter, will free him of that obligation to dispose a proportion of the whole debtor's estate comprised, the right of redemption being expired, although no consent was given.¹ The import of this decision seems to be, that the primary object of the trust was the payment of the debt, which was fulfilled to the full amount by the trustee; so that in fact the trustor could properly claim no more; and although there was a reservation in the deed, that the portion of the common debtor's estate over which his apprising reached should not be reconveyed without his consent, still he had no good claim against the trustee, no ameliorations having accrued to him from the estate, over which there might have been a claim; there was no relief, no eases to communicate, for there was no burden, and having put the property in the hands of the trustee, he was bound by his actings in conveying the estate; any question as to powers between the trustor and trustee, could only extend to the amount of estate placed in the hands of the trustee. But on the other hand, where directions are specially given in the trust-deed that certain acts shall be done by the trustee, as, that certain funds shall be laid out in a certain manner, as by the purchase of a particular kind of property, or stock, or other security, these special directions must be strictly attended to.² Thus, where trustees were directed to purchase property of a certain yearly rent, and to dispose it to a party named, they

Special directions must be strictly fulfilled; no discretion being permitted as to them.

¹ Murray, 24th June, 1674, 1 B. Sup. 713.

² Sym, 13th May, 1830, 8 S. 741.

were held to be bound to make the purchase, and not entitled merely to hand over the price to the beneficiary.¹ It will not do that the trustees may have thought the course adopted by them amounted to an equivalent, or even conceived it to be a much more advantageous course than the one pointed out by the trust-deed; and though they have apparently the most satisfactory reasons for considering it to be so, still the proper course to be adopted, and therefore the only safe one, is to follow as nearly as possible the directions of the deed. Although it is necessary and proper that trustees should exert their judgment in the ordinary course of administration, as in making purchases and taking securities, in accordance with the intention of the trustee and advantage of the estate, and in doing so are therefore free from responsibility, yet in regard to the particular kind of property to be purchased, or the particular manner of laying out money at interest, and securities to be taken *expressio unius exclusio alterius*, there is no room for latitude; the trustee is not entitled to exercise his own judgment, and nothing which the trustee may have considered to be equivalent will be allowed, notwithstanding he may conceive, that by adopting a course different from the one specified, however slight that difference may be, and however good and conclusive his reasons may appear to be, still there is no call upon him to adopt them; that was matter for the trustee's consideration, the trustee's duty is to fulfil the directions of the trust-deed; in accepting of the trust, he undertakes no more, and is bound, and

¹ Train, 26th May, 1824, 3 S. 68.

Liabilities
from contra-
vention of this
rule.

therefore expected, to do no more. Cases of the greatest hardship to trustees may and do arise where, in the exercise of an office undertaken from the desire of obliging relations or friends, a measure has been adopted with the desire of following out the commendable intention with which it was undertaken; apparently highly to the advantage of the trust-estate, and a liability of the most serious nature has been incurred; still, however perfect the *bona fides* may be, the act is an unauthorized one, and law holds that liability is thereby incurred. Thus, where gratuitous trustees were directed to invest the residue of certain trust-funds in the purchase of lands in Orkney, or wherever they should judge expedient, to be conveyed in favour of the heir in possession of the trustee's entailed estate, and of the other heirs of entail — and they invested a portion thereof in the purchase of feu and teind duties, payable to the superior from the entailed estate, — it was held, that this was not a legal or warrantable application of the trust-funds, but was a violation of the directions contained in the deed.¹ So, also, where the trustees of an hospital were empowered by a statute to sell lands and houses of which they had the *dominium utile*, and to purchase other lands lying as fitly and advantageously for the benefit of the hospital, — it was held, that the statute did not authorize them to purchase feu-duties.² If trustees be bound down to purchase lands in a certain locality, or to lay out money in a particular kind of security, the proper course is to put the funds at interest in the best and most responsible

¹ Pollexfen, 14th July, 1841, 3 D. 1215.

² Governors of Cauviu's Hospital, 29th Jan. 1842, 4 D. 556.

manner they can obtain, until an opportunity shall occur of investing it in the particular manner specified; but on no account to vary from the directions because of difficulty in at once having it in their power precisely to follow the directions of the trust-deed.

But again, on the other hand, trustees are not bound to do more than the trust-deed, according to legal rule and interpretation, will authorize, notwithstanding that the presumed intention of the trustor may thus be defeated. Thus, where a trust-deed directed the trustees to convey certain heritable subjects to one of the trustor's nephews—and it was declared by a codicil to be the trustor's intention, that if the nephew or any of his issue should succeed to a certain other estate, he or they should be bound to denude themselves of the estates conveyed by the trust-deed, in favour of another of the trustor's nephews,—it was held, that the trustees sufficiently implemented the directions of the deed by embodying the declaration in the conveyance executed by them, without making the obligation to denude a real burden on the lands.¹ By the deeds there was a mere personal obligation on the heirs, and no restriction to the trustees, in virtue of which they should create a real burden to give effect to the wish of the trustor; but this wish he did not take the proper steps to enforce, *quod voluit non fecit*, as it could only be attained by a deed of entail.

The acts of trustees, in order to be valid and binding, must be guided by the conscientious desire of benefiting the estate in every manner consistent

Trustees not
bound to do
more than
deed directs.

Acting must
be consider-
ate.

¹ Pearson, 10th June, 1842, 4 D. 1393.

with the conditions of the trust, all fraud,¹ or collusive actings with third parties,² or with the trustee, in trusts for creditors,³ are therefore wholly ineffectual as regards the estate.

As already mentioned,⁴ trustees cannot delegate their powers, but have the power of appointing factors on trust-estates, where such are necessary, though special power of doing so be not given in the trust-deed. But if they shall appoint a factor,
Must superin- tend actings, of factors. they are bound to superintend his actings.⁵ By his appointment the factor acquires certain powers of superintendence over the estate, but the offices are quite consistent with each other, and quite distinct; the factor is merely, as in other cases of factory, a manager for the proprietor, who, in the present case, is a trustee; and where the appointment of a factor is necessary, they are not bound to cause him to find caution, it is enough to free them from liability, that he shall have been habit and repute solvent at the time of his appointment, although the trust-deed should contain no clause of immunity.⁶ Where a solvent party is appointed factor, trustees are not bound to superintend the individual actings of the factor, such as the uplifting and discharging rents by tenants, settling as to ameliorations or repairs stipulated in the various leases, payment of public burdens, &c., but they are bound to see that he renders accounts, by a rental, at stated

¹ Thomson, 15th Nov. 1786, M. 10229.

² Wood, &c. 14th Nov. 1833, 12 S. 42.

³ Graham, &c. 9th June, 1824, 3 S. 117.

⁴ See *sup.* page 131.

⁵ Sym, 13th May, 1830, 8 S. 741.

⁶ Thomson, 16th Feb. 1838, 16 S. 560. See, however, Limitation of Liabilities for Factors, &c., part 2, c. 8, s. 3, 2.

periods, and deposits the balance in his hands with a banker, or other cashier appointed by them. Thus, where a party became bound that a factor should account for his intromissions under the usual and very proper stipulation that discharges should be granted at least once a-year, and this was not done, it was held, that he was liberated from the obligation.¹ Where they authorize funds to be uplifted, it has been held, that they are bound to see that they are properly invested, or otherwise disposed of.² They are, however, bound by sales made by factors under general powers.³ And when made under special powers, the transaction must be regular and concluded; this being especially necessary where one party is binding another, his constituent in an important transaction.⁴

It is the duty of trustees to exhibit the trust-deed to all having an interest. This is necessary, not only that such parties may have it in their power to prevent trustees from acting inconsistently with the trust-deed,—for where a party has a claim for damages, in the event of an injury arising from the conduct of another party, he has also a right to take all due means to prevent that injury from arising,—but also from the circumstance, that in many cases it may be absolutely necessary for parties interested, that they should be aware of the import and effect of the deed, either as a trust-deed or otherwise. And, indeed, the trustees can have no *bona fide* personal grounds for objecting to it, nor can there be any plea on the ground of interest of the

When bound
by them.

Must exhibit
trust-deed.

¹ Forbes, &c., 10th June, 1829, 7 S. 732.

² See Ib. and *inf.* part 2, c. 8. & 3, 2.

³ Thomas, 4th July, 1829, 7 S. 828; Do., 4th Dec. 1832, 11 S. 162. See also, *inf.* part 2, c. 7.

⁴ Milne, 19th Feb. 1836, 14 S. 533.

trust which will avail against the positive right of a party having an interest.¹ So, also, they are bound to give information to interested parties with regard to the progress of the trust-management, as, with regard to the sale of trust-property, payment of debts, &c.,² and are bound to exhibit to such parties their accounts, on reasonable ground for such demand being stated. Nor is this in any way at variance with the rule, that trustees, as already stated,³ are entitled to be protected against interference, on frivolous grounds, with their administration of the trust-affairs; for information being afforded to interested parties, on reasonable grounds, as to the state of trust-actings, is wholly distinct from interference with actual administration. Nor are the principles stated by the majority of the Judges, in the case of *Tod v. Tod's Trustees*,⁴ at variance with this, but the reverse, that being a very special case, and the general rule undoubtedly being that beneficiaries are entitled to inspect trust-accounts either before or after periodical settlements, or reference to an accountant. And in entering into the investigation of questions where the propriety of the actings are to be considered, notwithstanding that the office of trustee is one which, above others, is the result of exuberant confidence, yet that is not such a circumstance as entirely to exclude, due weight being given to the effect of improper motives on personal interests existing in trustees, when such has been clearly elicited by competent proof.⁵ As

¹ Nicol, 19th June, 1829, 7 S. 777; Provan, 25th May, 1830, 8 S. 797. See also Campbell, 8th August, 1783, M. 3973; Wilson, 8th Jan. 1717, M. 3965.

² See Eng. Ca. of Clarke *v. Earl of Ormonde*, Jac. 120, per Lord Eldon.

³ Sup. page 123. ⁴ 27th May, 1842, 4 D. 1275.

⁵ See opinions of Lords Cunningham and Ivory, in *Tod*, *ut sup.*

trustees in heritage are feudally invested in the property, they must necessarily, in right of the trustor, give titles to heirs, singular successors, adjudgers, &c., of the vassals of the estate.

The first duty of a trustee on entering on the administration of the trust, is to take investiture in the manner already stated,¹ as it affords the means of protecting the validity of the trust-deed against the interference and diligence of non-acceding creditors, if the trustor is not rendered bankrupt within sixty days of due publication of the investiture by registered seisines and acts of possession in the case of moveables,² and likewise in the case of trusts for creditors, to prevent the interference of the trustor by subsequent conveyances to *bona fide* purchasers.³ In the case of a trust for sale, however, it is not always necessary that the trustee should be infest. Thus, where an estate was conveyed to trustees and their assignees or donees, excluding the heirs and executors of the trustees, for payment of debts, and settling the residue, with power to sell and grant conveyances, and an obligation to infest the trustees and their assignees at the charge of the assignees, there being a procuratory for infesting the trustees and their assignees, and a precept to give sasine to the trustees and their assignees in trust for the uses, and with the powers, and under the burdens, conditions, and provisions contained in the deed; the trustees having sold the estate and assigned the precept, without taking infestment, and the purchaser

Duties as feu-dal superiors.

Duties on assuming office.
Investiture;
when necessary.

¹ *Sup.* page 75.

² See Gibson, 29th May, 1841, 3 D. 974; and also Pagan, 17th January, 1823, 2 S. 125.

³ So also in England, see *Jacob v. Lucas*, 4 Beav. 436.

having been infect in the precept, and sold the estate again, the question arose, whether the titles thus made up were good? It was held that, in the general case, such a precept is assignable, as, being transferable, *qualificate*, and as under a power to sell to one not to be bound by the conditions of the deed of trust, the deed may be assigned under that quality, express or implied, but that, in this case, the precept was expressly granted to assignees.¹ Here the trustees merely acted as commissioners: they might have been forced to take infection before selling or transferring, but not having been so, the conveyance was feudally complete. To avoid the expense of an entry with the superior by the trustees, as singular successors, the heir of the trust sometimes agrees to take an entry on their behalf, and to execute any conveyance they may require.² But the act of investiture is one of the highest importance, and to which the greatest attention should be paid, as the liabilities which may be incurred by it are of a very serious nature.³

Realizing of
estate.

A trustee must also proceed to realize the estate as soon after entering on the duties of his office as possible, and must therefore do diligence for the recovery of it, where necessary; and if specially intrusted for the purpose of doing diligence, he is bound to do exact diligence.⁴ He must do diligence, likewise, in order to prevent prescription.⁵ This, likewise, is an important part of the duties of trus-

¹ Cockburn, 4th June, 1836, 14 S. 889.

² Hill, 5th February, 1824, 2 S. 681.

³ See part 2, c. 8 s. 2.

⁴ See Stark, 26th June, 1714, M. 3540; Wemyse, 10th June, 1674, M. 3538. In England, actions must be brought by the trustee, the cestuique trust, though the absolute owner in equity, being by law regarded in the light of a stranger. See Allan v. Imlett, Holt, 641; Gibs v. Winter, 5 B. and Ad. 96.

⁵ McClellan, 24th June, 1756, M. 11160.

tees, and ought strictly to be attended to, as it is by no means an uncommon occurrence for liability to be incurred by trustees, from their not having called in the whole debts due to the estate ; but having only done so where they could be more immediately realized for the purposes of the trust, and have delayed or failed to do diligence, to force the recovery of them, and in the meanwhile some one or more of the debtors to the trust-estate have become bankrupt.¹ This error is of very frequent occurrence in the case where the whole bankrupt estate of a party is ceded by him to a trustee for behoof of his creditors.

It is not, however, by any means an invariable rule, that trustees are necessarily bound to call in funds properly invested, both in point of safety and interest derived from it. By the law of England, as well as by our own law, trustees are bound to allow funds so invested to remain so, and not to call them in unless for the immediate purposes of the trust.²

In realizing the estate, trustees are not entitled to relinquish any means or securities by which there is

Funds properly invested.

Must not relinquish valid claims.

¹ See Marshalls, 6th February, 1677, 1 B. Sup. 760.

² Thus, in England, if money be outstanding upon good mortgage security, for on these securities he has the testator's confidence, but on any new securities it would be at his own peril ; Orr v. Newton, 2 Cox, 274, per Lord Thurlow ; Howe v. Earl of Dartmouth, 7 Ves. 150. But assets must not be allowed to remain outstanding upon personal security ; Lowson v. Copland, 2 B. C. 156 ; Bailey v. Gould, 4 Y. and C. 221 ; though the debt was a loan by the testator himself, or what he considered an eligible investment ; Powell v. Evans, 5 Ves. 839 ; and see Tebbs v. Carpenter, 1 Mad. 298 ; Clough v. Bond, 3 M. and Cr. 496. And it will not justify him if he merely apply for payment through his attorney, but do not follow it up by instituting legal proceedings ; Lowson, *ut sup.* ; and Bailie v. Gould, *ut sup.* 226, per Baron Alderson. But trustees are allowed a reasonable time in calling in funds, even although invested on security of a considerably fluctuating nature, expressions such as to convert "with all convenient speed," being held to infer the ordinary duty implied in the office ; Buxton v. Buxton, 1 M. and C. 80, per Lord Cottenham.

a possibility of claims on its behalf being made effectual, on proper means being adopted ; or, indeed, in any way to relinquish claims until satisfied. They are not entitled, in the case of a bond for instance, to give a general discharge, for any reason except that of having received full satisfaction of the claim under it.¹ And if any steps have been taken by the trustees, for the purpose of compelling payment, they are not entitled of their own accord, for any reason other than satisfaction of the debt, to relinquish the means so adopted, and security thereby obtained. Thus, if trustees shall have thrown a debtor into prison on a caption, but afterwards liberated him without applying to the creditors for their consent, if the debt shall be afterwards lost, the trustees will be liable for it.²

*Must defend
interests of
beneficiaries,
and validity of
trust-deed.*

Trustees are also bound to fulfil and protect the interests of their constituents in every way, and accordingly, where an assignment in trust has been made for leading an adjudication, and a back-bond granted to the cedent to make payment in case it should be recovered, the trustee disposing and affecting the same with the back-bond, is bound to pay the cedent, or to obtain a retrocession from the persons to whom he disposed.³ They are also bound to defend the validity of the trust, and are free from liability for expenses in doing so.⁴

*Investing of
funds.
Must be
strictly in
terms of the
deed.*

On realizing the trust-funds, it is the duty of trustees, where so directed by the trust-deed, to invest them in name of the trust, as soon thereafter

¹ Dundas, 22d July, 1673, 1 B. Sup. 692.

² Abercromby, 31st Jan. 1723, 4 Robert. Ap. 457.

³ Earl of Northeak, 5th Jan. 1675, 1 B. Sup. 726, and 549, and M. 16172.

⁴ Dickson, 20th Nov. 1829, 8 S. 99.

as possible.¹ And, as already stated, where directions are given to make a permanent investment of property, as to purchase lands and entail them, or otherwise, the terms of the deed must be attended to with as much strictness as possible.² It will not do to allow trust-funds to be otherwise disposed of than as clearly directed by the deed, even though they be applied to the behoof of the parties for whom the trust was created, and administered by one of those parties, and though in the position of natural guardian of the others interested, as in the case of trustees neglecting to invest money in terms of the trust-deed, and allowing it to be uplifted by the husband of the party for behoof of whom and whose children the trust was created; for such a course is clearly inconsistent with the purposes of the trust, and in adopting it the trustees fall short of their duty.³ In obeying instructions as to the investment of funds for particular purposes, the greatest care must be taken that it is done, not only in strict compliance with these instructions, but also, that the subject is sufficient, and that the investment is in every way correctly and effectually made. In these matters, however, trustees are bound and entitled to employ and rely upon professional men;⁴ but against the professional men so employed no personal exception must exist.⁵

Assistance of
professional
men.

¹ Morrison, 9th Feb. 1827, 5 S. 322; Sym, 13th May, 1830, 8 S. 741; Montgomery, 4th June, 1822, F. 1 S. 453.

² Wellwood, 23d June, 1831, 9 S. 790.

³ Anderson, 12th Feb. 1833, 11 S. 382.

⁴ Graham, 4th March, 1831, 9 S. 543.

⁵ Mayne, 4th June, 1835, 13 S. 870. These two last mentioned cases of Graham and Mayne conflict with each other as to the liability of trustees for the errors of law-agents; for although the decision in the latter case be correct in its general result as regards the liability of the trustees, it is so, not

*Rule as to
interest.*

Having invested the fund in a proper manner, the trustee may not be farther bound, annually, or at other periods, to add to the principal the interest accruing therefrom ; but if he place it in a bank in his own name, or allow it to be so in that of a factor, the reverse will be the case ; as, for instance, where a trustee, under a private trust, was empowered to consign dividends in certain banks at the risk of the creditors, and did not do so, but kept them in the private bank account of the cashier of the trust, and a creditor did not claim payment for several years, but, on doing so, received payment of the dividend, and of simple bank interest thereon, the trustee was held farther liable for such annual accumulation of bank interest as had actually been made by the bank on the dividend ;¹ this was also due on the principle, that the trustee can derive no advantage from the trust-estate, but must communicate all easies.

on the ground upon which it is rested by the Court, namely, that of liability for not seeing the duty of the law-agent correctly performed, but on that upon which it is placed by the Lord Ordinary, namely, their having employed a party as law-agent who was least worthy of being trusted, in consequence of a personal objection indicated by the trust-deed.

¹ Campbell, 9th July, 1840, 2 D. 1367. In England, also, if the subject of the trust be money, it may be safely and properly deposited in some responsible banking house, Routh *v.* Howell, 3 Ves. 565 : Jones *v.* Lewis, 2 Ves. 241, per Lord Hardwicke ; Adams *v.* Claxton, 6 Ves. 226 ; *ex parte* Belchier Amb. 219, per Lord Hardwicke ; Attorney General *v.* Randall, 21 Vin. Ab. 534, per Lord Talbot ; Massey *v.* Banner, 1 Jac. and Walk. 248, per Lord Eldon ; Horsley *v.* Chaloner, 2 Ves. 85, per Sir J. Strange ; Fraunce *v.* Woods, Taml. 172 ; Lord Dorchester *v.* Earl of Effingham, Id. 279.. But the trustee is liable for the failure of the bank if he do not guard against his own insolvency by paying in the money to the account of the trust-estate, and not to his own credit ; Wren *v.* Kirton, 11 Ves. 377, 386 ; Massey *v.* Banner, 1 Jac. and Walk. 241, and see Fletcher *v.* Walker, 3 Mad. 73. But the trustee must not lodge the money in such a manner as to put it out of his own control ; Salaway *v.* Salaway, 14 Russ. 60, and 2 R. and M. 215, 220.

Where trustees have brought the affairs of the trust to a termination, it is their duty to see the funds properly deposited in a bank, and not to allow them to remain in the hands of any of their number,¹ or they must invest them in terms of the deed, where special directions are given. In England, questions have arisen as to the duties and liabilities of trustees in transmitting money to a distance, in regard to which it has been decided, that they are in safety if they do so through a bank, or in accordance with the usual custom in such transactions, as by bills drawn by a person of undoubted credit, and payable at the place to which the money is to be sent.² These rules will probably apply, in such cases, in our own law; but the proper and only safe course to be pursued by the trustees, in doing so, is to intimate it to the party to whom the money is to be paid, desiring information as to the manner in which he wishes it to be transmitted.

The only competent investment of trust-funds by trustees are, 1. In heritable security, care being taken that it may be called up, as soon as required, for the purposes of the trust; or, 2. In three per cent consolidated bank annuities, as being government stock, which, in England, is considered the proper investment, but not so in Scotland, for here, although competent, it is not preferred to heritable security. The question frequently arises, is the security of a banking company, in any case, sufficient? Heritable security, when offered by such

Disposal of
funds on ter-
minating
trust.

Transmission
of funds.

What proper
investments of
trust-funds.

¹ M'Nair, 24th June, 1830, 8 S. 968.

² Knight v. Earl of Plymouth, 1 Dick. 120, S. C. 3 Atk. 489, per Lord Hardwicke, *ex parte Belchier*, Amb. 219; Rowth v. Howell, 3 Ves. 566; and see Wren v. Kirton, 11 Ves. 380, 385.

a company, is as competent as any other; but where the income derivable from such heritable estate is dependent upon a fluctuating source connected with trade, the security is insufficient, unless the value of the heritage shall be greatly beyond the sum borrowed, or which may legally be borrowed, upon the security of it. Thus, in the case of railway bonds for money borrowed by authority of an act of Parliament, on the security of the company's property; or road bonds for money borrowed by road-trustees, by authority of act of Parliament, upon the security of the toll dues—the security in a great measure depends upon a fluctuating source of income, and therefore is insufficient; nor will the addition of the personal responsibility of parties supply the defect and obviate the objection in point of law, for such are not preferable securities. Still less, therefore, is investment in the stock of a banking or other trading company competent.

General rule
as to invest-
ment.

Investment by private parties, and investment by trustees, are quite distinct in their nature; for that which may evidently be a safe and desirable investment for the former, may not be so for the latter, in point of law; for the law looks to the security of the funds as the chief object to be attended to, and therefore admits of that kind of security alone which amounts to a conveyance of full actual value, or the most certain security, as that of the state.

Heritable
securities.

Heritable security over lands, therefore, yielding a rental superior to the legal rate of interest, is the most unexceptionable; and being secured by infestation, after a due search of the records for incumbrances, a trustee is uniformly held justified in

tending the trust-fund on that security.¹ Formerly there was no doubt relative to such cases, because, for more than a hundred years after the revolution of 1688, land continued constantly to rise in price, and rental; but of late years so many reverses have occurred in these respects, that it has become necessary for trustees to act with some caution. Occasionally there is offered, in addition to the real security, the personal obligation of a solvent party for the regular payment of the interest. In this way all difficulty is removed; more especially as the abundance of money capital renders it often difficult for trustees to find investments for money on heritable security.²

The security of house property has of late years sunk into much discredit, in consequence of the

¹ This is not the rule in England. The investment of money on mortgage appears always to have been there discouraged; *Brown v. Litton*, 1 P. W. 141; so, also, upon real estates; See *Knight v. Earl of Plymouth*, 1 Dick, 126, per Lord Hardwicke; *Pocock v. Reddington*, 5 Ves. 800, per Lord Alvanley; although it was held, that trustees would be justified in so laying them out, if apparently well secured. But by the later practice, such investments are held to be improper; see *ex parte Cathorpe*, 1 Cox. 182, per Lord Thurlow; *ex parte Ellice*, Jac. 234; *Norbury v. Norbury*, 4 Mad. 191; and see *Widdowson v. Duck*, 2 Mer. 494; *ex parte Johnson*, 1 Moll. 128; *ex parte Ridgeway*, 1 Hog. 309. Government or bank annuities being there held, contrary to the practice in Scotland, to be the only unobjectionable investment; see *infra*, p. 228, note 2. With regard to the value of the property over which the security is taken, when trustees are expressly authorized to invest on real security, as they generally are, they must not advance more than two-thirds of the actual value of the property, if it be freehold land; *Stickney v. Sewell*, 1 M. and C. 8. And they are precluded from lending on mortgage to one of themselves, *Stickney, n^t s^p*.

² As regards the borrower, the rule is, that the trust shall be kept out of sight altogether, and that the transaction shall be as between the borrower and the trustees as individuals; so that on redeeming his obligation by payment, the borrower may not be obliged to see to the application of it for behoof of the trust-estate. So, also, in England; see *Lewin on Trusts*, 280. But it must be observed, that whilst the benefit to the estate is increased by such investments, the security is diminished, and subjected to the risk of the trustee's bankruptcy.

alteration in price and rental that has occurred in the larger cities with regard to that species of property. Trustees would act unsafely, were they now to lend on that security, without obtaining to be bound to them a manifestly great surplus of value.¹

Public funds. Government stock has generally been held to form a security to which trustees may lawfully have recourse, especially the three per cents consolidated bank annuities.² But when the extraordinary

¹ It is held in England, that trustees will not be justified in advancing so much as two-thirds of the actual value of property, where it consists of houses, or if it be otherwise of a deteriorating character ; see, *Stickney v. Sewell*, 1 M. and C. 8 ; and —— v. *Walker*, 5 Russ. 7.

² This is the fund or particular investment adopted by the courts in England, as being, from its low rate of interest, the least likely to be determined by redemption, see *Howe v. Earl of Dartmouth*, 7 Ves. 151 ; government or bank annuities generally being preferred, as the directors have no concern with the principal, but merely superintend the payment of the dividends and interest till such time as the government may pay off the capital, it is not in their power, by mismanagement or speculation, to hazard the property of the shareholders ; *Trafford v. Boehm*, 3 Atk. 444, per Lord Hardwicke. And these funds are, in England, preferred to heritable investments, and held to be the only proper investment where no express power or direction is given ; although the Court will not permit a mortgage to be called in, and the money converted into the three per cents, without inquiry as to whether it will be for the advantage of all concerned ; see *Howe, ut sup.* If any stock other than three per cent consols be especially bequeathed to one party in livery, and another in fee, the Court has no power to direct a conversion into three per cent consols ; see *Howe, ut sup.*, and *Holland v. Hughes*, 16 Ves. 113. This will not be affected by a power of varying the securities ; *Lord v. Godfrey*, 4 Mad. 455. Investment in three per cent reduced annuities was ordered, however, where the annual produce was directed to be paid at certain stated periods which agreed with periods of payment of the dividend of that stock ; *Caldecott v. Caldecott*, 4 Mad. 189. Where successive estates are limited, (*i.e.*, where there are substitutions,) the interests of all must be looked to, and therefore three per cent bank annuities must be adopted ; and if a testator's estate consist of bank stock long annuities, or other fund, either not a government security, or not of the most permanent character, the Court directs a conversion into three per cents bank annuities, *Howe, ut sup.* and cases cited there ; *Mills v. Mills*, 7 Sim. 501 ; and see *Pickering v. Pickering*, 4 M. and Cr. 289 ; and even four per cent, and five per cent bank annuities, as more liable to the chance of redemption, are ordered to be similarly converted ; *Howe, ut sup.* 151, per Lord Eldon ;

fluctuations which occurred during the French revolutionary war are remembered, many will be disposed to regard it with some jealousy. At that period, money that had been invested at L.90 for each L.100 was occasionally sold for L.50 or L.60 per hundred, and this, of necessity, either resulting from the terms of the trust-deed, or the circumstances of a family which forced on a sale at a particular date. In these times, various trusts, originally rich in funds, terminated in much loss, and even ruin, to individuals who had relied upon them. Still, however, the investiture of money in three per cent stock is legally safe, so far as the trustee personally is concerned;¹ although, in justice to the estate, he will be disposed to prefer landed security in Scotland when it can be obtained.²

Powell v. Cleaver, and other cases cited, Id. 142; permanency and safety being more looked to than the immediate interest of the life-renter. And it has been held, that a trustee, who is authorized to invest in government securities, may not invest in exchequer bills. *Ex parte Chaplin*, 3 Y. and C. 397.

¹ *Trafford v. Boelium*, 3 Atk. 444, per Lord Hardwicke; *Howe v. Earl of Dartmouth*, 7 Ves. 151; *Bird v. Lockey*, 2 Vern. 744, *ex parte Champion*, cited in *Franklin v. Frith*, 3 B. C. C. 434; *Powell v. Evans*, 5 Ves. 841, and *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Knight v. Earl of Plymouth*, 1 Dick, 126; *Peat v. Evans*, cited in *Hancome v. Allen*, 2 Dick, 499, note; *Holland v. Hughes*, 16 Ves. 114, per Sir W. Grant; *Moyle v. Moyle*, 2 R. and M. 716, per Lord Brougham, and see *Jackson v. Jackson*, 1 Atk. 513.

² As to the general question, whether, in a case in which the trust-deed is silent on the point, trustees may safely lend money on personal security? the English law answers expressly in the negative; *Darke v. Martin*, Beav. 525, *Adye Feuilletreau*, 1 Cox. 24; *Holmes v. Dring*, 2 Cox. 1; *Terry v. Terry*, Pr. Ch. 273; *Ryder v. Bickerston*, cited in *Harden v. Parsons*, 1 Ed. 149, note a, and in *Walker v. Symonds*, 3 Sw. 80, note a; *Vigrase v. Binfield*, 3 Mad, 62; *Walker v. Symonds*, 3 Sw. 63; anon. case, Loft, 492; *Keble v. Thomson*, 3 B. C. C. 112; *Wilkes v. Steward*, Coop. 6, and Loft, 492; *Clough v. Bond*, 3 M. and Cr. 496, per Cur.; *Pocock v. Reddington*, 5 Ves. 799; *Collis v. Collis*, 2 Sim. 365. Even where power to lend on personal security, where thought sufficient, is expressly given by the trust-deed, such a power will not authorize a mere accommodation, as to a party in trade who is husband or near relation of the beneficiary; *Langston v. Ollivant*, Coop. 33;

Property situated abroad.

Funds invested abroad.

It may happen that a considerable or the largest part of a trust-estate may consist of plantations in the West Indies, or of indigo or sugar plantations in the East Indies. In such cases, the trustee or trustees may be forced into a course of trading or of management, concerning which, it is impossible to fix an absolute rule that will govern all cases. It can only be said, that the trustee must endeavour to obtain the best advice on the subject, and do that which appears most beneficial to the trust. If the parties on whose behalf the trust is held be competent to give advice, they may with propriety be consulted. As a general rule, however, the trustees ought to endeavour, as soon as prudence and a regard for the general welfare of the estate will permit, to realize the distant funds by sales, and to draw together the whole estates into this country. In the case of money remaining at interest in the East Indies, and lent out by the trustee, there may be a temptation to let it remain on account of the high rate of interest obtained ; but recent events have shewn

but see *Burt v. Ingram*, 15th July, 1839 ; and all the conditions annexed to the power must be strictly observed ; *Bateman v. Davis*, 3 Mad. 98 ; and see *Cocker v. Quayle*, 1 R. and M. 535 ; and such will not hold as communicated by a direction to place out the money at interest "at the trustee's discretion," see *Pocock v. Reddington*, 5 Ves. 794 ; or "on such security as the trustee can procure, and may think safe," *Wilkes v. Steward*, Coop. 6 ; and see *Mills v. Osborne*, 7 Sim. 30 ; nor in such a case can joint trustees lend to one of themselves ; — *v. Walker*, 5 Ross. 7 ; and see *Stickney v. Sewell*, 1 M. and C. 14. And it does not appear that the law of Scotland has laid down a different rule. And in England, trustees are not in safety to employ trust-funds in adventure, however plausible, such as in banking ; *Howe v. Earl of Dartmouth*, 7 Ves. 150, per Lord Eldon — railroads, canals, navigation, or other trading speculation ; *Trafford v. Boehm*, 3 Atk. 440 ; *Mills v. Mills*, 7 Sim. 501 ; *Adie v. Fennilitteau*, cited in *Hancom v. Allan*, 2 Dick, 499, note ; *Emelie v. Emelie*, 7 B. P. E. 259 ; and see *Lewin on Trusts*, 278. Power to invest money in trade is not implied from such expressions as "to place out at interest, or other way of improvement;" *Cock v. Goodfellow*, 19 Mod. 489.

that such views are extremely unsafe, and that no security there ought for a length of time to be relied on by trustees here, except that of bonds of the East India Company.¹

In whatever way trust-property may be invested by trustees, it must be taken payable to the whole trustees jointly, and not in name of any one or more of them merely.² Where either a trustee or factor takes a bond for trust-property in his own name, the *jus exigendi* descends to his representatives, but for behoof of his constituents.³ But in lending or depositing in a bank money belonging to the trust-estate, the trustee ought to take the bonds or receipts payable to himself and his successors in office, as trustees for behoof of the trust-estate. If he do otherwise, in the event of his becoming bankrupt, the funds so invested might be lost to the estate, or at least they could only rank along with the general creditors;⁴ whereas, if taken due to the trust-estate, these funds are free from all risk or liability, except for debts properly and necessarily incurred by the

In whose
name trust-
funds to be
invested.

¹ In England it is held that, where a testator dies in India, and neither the fund nor the parties entitled to it are under the jurisdiction of the Court of Chancery, it is not the duty of trustees to transmit the assets to England, to be invested in the three per cent consols, but that they may invest them in the securities of the East India Company, and that the tenant for life (liferenter) will be entitled to the dividends or interest, though to the amount of ten or twelve per cent; and that, if the parties return to England, and so come under the jurisdiction of the courts there, the funds may then be brought over at the instance of the remainder man, (substitute,) and that the tenant for life must submit to the consequent reduction of his income. Holland *v.* Hughes, 16 Ves. 111, S. C. 3 Mer. 685.

² So also in England. Thus they could not lay out money or India bills (where so authorized) to one of their number individually; Walker *v.* Symonds, 3 Sw. 1. See also Salaway *v.* Salaway, 2 R. and M. 218. *Ex parte* Griffin, 2 Gl. and J. 114; Clough *v.* Dixon, 8 Sim. 594, 3 M. and C. 490.

³ Crawfurd, 30th November, 1739, Elch. Trust, 8.

⁴ Wren *v.* Kirton, 11 Ves. 377 and 380; Fletcher *v.* Walker, 3 Mad. 73; Massey *v.* Banuer, 1 J. and W. 241; Campbell, 4th July, 1840, 2 D. B. M. 1367.

*Exception.
Surrogatum.*

trustee. The general rule now stated will take effect, unless a clear case of surrogatum be proved, shewing the fund lent to have proceeded directly from the trust-estate, in which case the creditors of the trustee, using legal diligence, will have no higher right than belongs to the trustee himself, as in the case of *Cook v. Jeffrey*,¹ in which it was held, first, that where parties, proved to have been co-trustees, and, secondly, where the documents shewed that securities taken by one of them, *privato nomine*, were taken in security of trust obligations, the other trustee was entitled to the benefit of these securities in preference to the general creditors of his associate or co-trustee.² The law of England on this subject precisely corresponds with that of Scotland.

Ought to keep
trust and per-
sonal affairs
distinct from
each other.

It is also the duty of a trustee to keep the affairs of the trust generally distinct from his own private transactions, and not to allow his actings in his capacity of trustee to become mixed up in any way with his interests as an individual, otherwise serious injury may arise to the estate, as, in the case where a person who had received money to buy goods for another had received them in his own name, without mention of the trust, in which case the property was found to be in him, and his creditors arresting were preferred.³ The same consequences may also arise in the case of latent trusts occurring in partnerships, where transactions are

¹ 29th November, 1831, 10 S. 75. See also *Hay*, 15th May, 1707, M. 15128; *Alison*, November, 1765, M. 15132.

² Questions of this last description will of course depend chiefly on the principles applicable to questions of proof in regard to the constitution of trusts. See *sup.* part 1, c. 7.

³ *Boylston*, 24th January, 1672, M. 15125. See also *Murray*, 5th December, 1797, M. 3237.

carried on by one party acting for others, whose names do not appear *ex facie* of the transactions, but who may still be liable for the debts of the company; for although the truster is preferred to the creditors of the trustee, — as the creditors of a trustee cannot stand in a better position than the trustee himself,¹ — still he will not be preferred to a *bona fide* onerous purchaser, who acquires a right or subject from a trustee without knowledge of the existence of any trust, or that the right of the seller is in any way limited. Thus, in the case of Redfearn,² the claim of a *bona fide* purchaser of shares of glass-house stock was found to be preferable to the claim of the partner of the seller, which partner had a latent interest in these shares: in accordance with which it was held, in Burns *v.* Lawrie's Trustees,³ that an intimated assignation in security of a debt admitted to be due, but not liquidated, was preferable to the right of a party founding on a prior latent obligation.

The next subject to be considered is the proper application of trust-funds. In trusts for family purposes, although the trust be created with power to sell property, and pay off debts, the trustee's duty is, to manage the affairs of his friend *bona fide*, and in a rational manner; he may therefore reduce effects into money, and discharge demands as they occur, and like the heir, is not bound to raise an action of multiple poinding till interpellled by legal diligence.⁴ If, however, the trust be for the payment of debts, and the instructions contained in the trust-deed shew, that it was the trustor's belief that

Application
of trust-funds.
General rules.

Trust for pay-
ment of debts.

¹ Dingwall, 6th June, 1822, Fac. Col.; Gordon, 5th February, 1824, Fac. Col.

² 26th May 1813, 1 Dow. 50.

³ 7th July, 1840, 2 D. 1348.

Alison, 22d Jan. 1793, M. 16211; Rankine, 24th Nov. 1741, M. 16201.

the estate would be barely sufficient to pay his debts, as he could, of course, have no lawful intention of giving a preference to particular creditors, the trustees are bound to pay no debts in particular, without first ascertaining the exact amount of claims, and of funds and other estate to meet these claims. It will not do to say, that they, the trustees, believed that there would ultimately be sufficient funds, or even a reversion. So strong is the rule, that a trustee cannot pay, even upon lawful sentences, in prejudice of debts stated to be due by a deceased trustor, but must raise an action of multiplepoinding.¹ Where a trust for payment of debts is duly constituted, and there is no accession by the creditors, such questions of preference cannot arise. Thus, where a party executed a disposition of his estates to trustees for family purposes and payment of his debts, and the trustees were infest, but none of the creditors acceded, and the trustees, on diligence being threatened by a creditor, paid the debt in full, — it was held, in a question between the trustees and the other creditors, that as the creditors had not acceded, no right was vested in them under the infestment, and that the trustees were entitled to take credit for the debt paid by them, although thereby the creditor to whom payment had been made got a preference;² for here there was in effect no competition at the time of payment, and the trustees were bound to pay the debt, as they were not trustees for these creditors; for in private trusts, properly constituted, that is, not reduced on the ground of insolvency or otherwise, if acceded to by creditors, they get the benefit, if not, then the

Where no
accession by
creditors.

¹ Scougall, 28th March, 1621, M. 3863.

² Pagan, 17th Jan. 1823, 2 S. 125.

trustees are not trustees for their behoof, and are not responsible to them. Where disputes occur by particular creditors claiming preference over each other, or parties setting up adverse claims as heirs or donees, the trustee may, if he think fit, decide the question of preference, but he does so at his own risk, that is to say, if he prefer a party not legally entitled to a preference, he will have to pay a second time to the party whom he erroneously postponed, reserving to the trustee to claim back his money from the party whom he erroneously preferred.¹ It is to avoid embarrassment of this description that the law allows the trustee the privilege of convening the contending parties before a court of law in a process of multiple poinding, concluding for exoneration of the trustee on once and single payment to the party whom the Court shall declare to be preferable.² Advice of counsel may very properly be taken and acted on in special cases, as to the propriety of making payments or conveyances,³ which will prove the *bona fides* of the trustee, although it may not protect him against the effect of absolute error.

Competition
among credi-
tors.

¹ See Eng. Ca. of Doyle *v.* Blake, 2 Sch. and Lef. 243, per Lord Redesdale, and see Urch *v.* Walker, 3 M. and C. 705, 706.

² See *spp.* page 120, and Eng. Ca. Talbot *v.* Earl of Radnor, M. and K. 252; Goodson *v.* Ellison, 3 Russ. 583; Curtis *v.* Candler, 6 Mad. 123; Knight *v.* Martin, 1 R. and M. 70, S. C. Taml. 237; Taylor *v.* Glanville, 3 Mad. 176; Angier *v.* Stannard, 3 M. and K. 566.

³ See Eng. Ca. of Vez *v.* Emery, 5 Ves. 141, and Angier *v.* Stannard, 3 M. and K. 566. Some difficult questions have occurred in England as to the course to be pursued where the cestuique trust is a feme covert whose husband is bankrupt; in which case it is held competent for the trustees to agree with the assignees to divide the fund, Ryland *v.* Smith, 1 M. and C. 53, giving one half to the assignees, and the other half to the wife and children, see Eden on Bank. 249, to the exclusion of the husband, Lloyd *v.* Williams, 1 Mad. 450; Barker *v.* Lea, 6 Mad. 33; Whittem *v.* Sawyer, 1 Beav. 593; but where the husband was merely insolvent, the wife and

Must beware
to make pay-
ments to pro-
per parties.

Preferable
debts.

In making payments, trustees are bound to take care that they only do so to such as are strictly and legally entitled to receive them, and will be responsible for them, and not merely to persons who, from official situation or other circumstances, they may be induced to think will necessarily be entitled to receive payments. Thus, where trustees paid part of a minor's funds to a curator bonis, who had never extracted his appointment nor found caution, and who soon after left the country in a state of insolvency, the trustees were held to have neglected their duty, and, accordingly, to be liable to pay the sum over again to the minor.¹ Trustees must beware not to prefer debts not heritably constituted to such as are so ; as, for example, personal debts to the widow's terce, which is valid against all burdens which are not feudally preferable to the husband's seisin.² They must also beware not to pay in prejudice of begun diligence.³ Where an annuity is created, as in the case of a provision for a widow by her husband, by a trust-deed of settlement, although the deed shall direct the trustees to lay out a sufficient sum to answer the same, and the principal to be divided among his successors after the annuitant's death, it is the duty of the trustees not merely to purchase an annuity with part of the funds, so as to leave the remainder free for immediate division, but they are bound to invest a fund sufficient to answer the said annuity,⁴ and they cannot denude until they

children were held to be entitled to the whole ; per Baron Anderson in Brett v. Greenwell, 3 Y. and C. 230.

¹ Donaldson and others, 18th June, 1833, 11 S. 740.

² Hepburn, 15th December, 1830, 9 S. 188.

³ Tarperiae, 18th Dec. 1673, M. 900 ; Crawford, 24th July, 1669, M. 1196.

⁴ Wilson, 31st January, 1833, 11 S. 343.

shall either have paid all the debts, or provided funds for their extinction.¹

With regard to the raising of funds by sales or ^{Raising funds.} borrowings, for payment of provisions falling due at different periods, considerable difficulty may arise as to the proper manner of doing so, keeping in view the interests of all parties concerned; the rule being, that unless specially directed by the deed, funds are not so to be raised unless immediately required for the purposes of the trust.² As to this, it has been determined in England, that if a specific sum be given to A, payable on her age of twenty-one years, or day of marriage, the money cannot be raised until the interest has become vested; for the execution of the trust is uncalled for till that period, and it cannot be anticipated for the convenience of the other parties interested; for should legacies be raised and invested by anticipation, the funds might afterwards become deteriorated, and the legatees be defrauded of the bounty intended them.³ Where the trust was to raise L.3000 for younger children, payable at their respective ages of twenty-one years, or days of marriage, it was held, that the trustees were not authorized to raise the entire sum when one child had attained the age of twenty-one; for the other children were entitled to have the heritable security continued for the security of their shares.⁴ But where the trustees were directed to raise, if there should be one child, L.6000, if two, L.8000, if three or more, 10,000 — and it was provided that no mortgage should be made until some one of the said

Fraser, 8th December, 1826, 5 S. 104, and *inf.* part iii. c. 9.

² See *inf.* part 2, c. 7. ³ Dickerson *v.* Dickerson, 3 B. C. C. 19.

⁴ Winter *v.* Bold, 1 S. and S. 507.

portions should become payable; there being seven children, four of whom were of age, and three minors,—it was held, that the trustees might raise the whole £10,000, investment in the three per cent consols being considered as equivalent to payment.¹

Must keep
books, ac-
counts, &c.

It is imperatively necessary in all cases of trust, that the trustees shall keep full and correct accounts, vouchers, and documents of every kind connected with their proceedings, and of the rights and liabilities of the estate, without which there can be no security for its safety and proper administration; their so doing is, indeed, the only safeguard to the trustees, as well as to the estate. The importance of this is very apparent in practical questions of liability. Thus, where a party acknowledged that he had got a bill in trust in order to recover payment; that he transacted the same with the debtor for a smaller sum; that he had lost the bill, and did not remember the sum therein contained, but declared that he was willing to pay what he got from the debtor,—the Court held the trustee's negligence in not keeping an account most unjustifiable, and therefore held him as confessed upon the whole sum libelled.² The conduct of trustees in all matters of accounting must also be *prima facie* correct; otherwise they will be liable to be interrupted by the Court; accordingly, where three brothers conveyed their estates, with powers of sale, to trustees, to realize funds, and pay a debt of £634,

¹ *Gillibrand v. Gould*, 5 Sim. 149. See also L. on T. 332, 341. Investigation on heritable security would probably be held equivalent, and indispensably necessary in such a case in Scotland.

² *Gourlie*, 28th Nov. 1710, M. 16192.

the sale of the estates of two of them produced alone L.1300 of gross proceeds, and the trustees alleging that the proceeds of the sales was only L.283, advertised the heritable estate of the third brother for sale, the Court passed a bill of suspension and interdict at his instance, in respect the accounts exhibited by the trustees required farther explanation as to the amount of free proceeds arising from the sale.¹

In trusts for family purposes, where a truster has been a partner in a mercantile company, or any trading concern whatever in which liability is incurred, and as to which no agreement has been entered into by the truster, which is binding on his representatives, to continue whilst the concern is prosperous, and there is no reasonable fear of loss,² or other such agreement binding the truster's successors — it is necessary that the trustees should, on assuming the trust, make strict inquiry into the nature of his connection with it, and of the liability incurred. The course to be adopted by the trustees, must necessarily depend on their own judgment and discretion ; but if the connection of individual partners with the firm terminates on their death, and the advantage to the trust-estate therefrom is at an end, it is of course the imperative duty of the trustees to take means to have the estate relieved from the liability attaching to it, in virtue of the truster's connection with the firm. If, however, which may frequently happen, special directions are contained in the trust-deed, to allow the funds, or a certain

Where trust-
er engaged in
trade.

¹ Pender, 17th Nov. 1831, 10 S. 19.

² As in case of Warner, 24th Jan. 1798, M. 14603 ; 19th May, 1815, 3 Dow, 76.

portion of them, to remain in the possession of the firm, under certain conditions, or where the co-partnery is made to continue to heirs and successors, and the trustees hold the estate for behoof of a minor, or for a particular purpose, then it is merely the duty of the trustees to comply with the provisions of the trust, and the risk which the estate runs, is incurred *ex proprio motu* of the truster, and is nothing more than that which attends ordinary mercantile adventures.

Termination
of co-partnery
by death of
truster.

The principal case in which difficulty to the trustees is likely to arise, and in which their own judgment and discretion must chiefly be depended on, is where, for instance, the copartnery virtually ceases, on the death of the truster, but from circumstances, an interest in the funds and estate, and therefore in the solvency and success of the copartnery, still belongs to the trustees, from the shares of the partners being, by the terms of the trust-deed, on their death, payable by instalments at certain fixed periods, perhaps extending over a series of years, in which case the question of expediency may arise, as to whether the trustees ought to permit the estate to remain burdened with liabilities attaching to it, for the purpose of supporting the credit of the copartnery, out of which the trust-property is to be realized. It seems clearly the safer course, that in such a case the trustees shall dissolve all connection with the copartnery as soon as possible; for the interest ought to be very important indeed, in the circumstances of the trust, to induce them to run the risks of mercantile liability arising from probably fluctuating sources of profit, that profit perhaps depending upon the return of an average of years, and not

always on a fair moderate amount of return. Of course, much depends on the precise nature of the trade in question; but it must be observed, that in such a case the trustees are under the disadvantage of incurring liability where they, in general, have no personal superintendence.

Another question of judgment may arise, in the case where it is in the choice of trustees, whether they will continue to carry on a mercantile speculation in which the trustee had been engaged.. Here the risk is precisely similar to that of the last case, and ought never to be incurred unless authorized by the trust-deed. At least it is evident, that trustees, however they may, in certain circumstances, be authorized in continuing in connection with the ordinary conducting of a copartnery, will not be in safety to enter into any bond, security, or other obligation, not evidently and plainly contemplated by the trustee or trust-deed.

A trust, having an interest in a copartnery involved in it, may be vested in trustees before the death of the trustee, during which period obligations may perhaps necessarily have been entered into by the trustees. In that case, and in every case where trustees are aware of liability attaching to the estate, they ought, unless deterred by some very cogent reason of large interest depending on it for some years *in prospectu*, to take immediate measures for clearing the estate from that liability.¹

Where trustees are appointed over an estate, their duty is to manage it in the most beneficial manner; but if a trust-estate shall consist of a particular

¹ Thomson, 16th Feb. 1838, 16 S. 560, see *sup.* page 155.

kind of manufactory or produce, the realizing a return from which is in the nature of trade in some degree, the trustees will not be authorized in carrying it on, even in the manner and extent apparently most conducive to the advantage of the estate, if precise directions to that effect be not given in the trust-deed, but mere general directions to superintend the management of the estate in the most advantageous manner. They may avail themselves of the natural resources of the estate, such as mines, if in operation, mills for the manufacture of country produce, or such as are used in trade of a more speculative kind, where it must, from the nature of the trust, have been the intention of the trustor that these should be carried on, though not explicitly stated in the deed. But they will not, without special orders to that effect, be entitled to originate any proceedings in the nature of trade—the success of which is necessarily contingent—except the mere ordinary availing themselves of the advantages of a stream, or the opening of a quarry, or such like; for it may be held, as a general rule, that it can never be the duty of trustees to engage in trade or speculation of any kind, unless such shall be an express object and purpose of the trust, that is, shall amount to a special mandate to do that particular act. Where trust-property contains, or even consists of mines, quarries, manufactories, or mills of any kind, the proper course to be adopted regarding them by trustees, is to let them to responsible tenants, on leases or otherwise, that being the only certain method of obtaining a fair and secure return; at once relieving the trustee from unnecessary liabilities, and the estate from the disadvantages

arising from expensive and defective superintendence by persons who must necessarily be employed to manage such matters, when carried on by trustees.

In letting and granting leases of trust-property, ^{Granting of leases.} where special directions are not given by the deed, the duration of these must depend, in a great measure, on the nature of the trust in question, and on its duration. In no case will it be allowed to exceed the ordinary duration of similar leases in other cases, and, in general, the rule is, to restrict their duration as much as is consistent with the interests of the estate. Where the trust is one of unlimited endurance, as in the case of mortifications, leases of the ordinary duration may of course be granted. Where it is of a more limited nature, care must be taken not to interfere with the beneficiary's right of disposal of his estate, in lease or otherwise, more than can be possibly avoided ; and therefore, to dispose of the estate in leases of such duration only as shall be as nearly as possible within the limits of the duration of the trust, or by letting it from year to year, or retaining it under the superintendence of their trust-factor. In cases of difficulty, as in trusts of uncertain duration, or where it is impracticable for the trustees to derive the full income from the estate without granting leases of a particular duration, as in the case of mines, &c., and where it is improper, or they are unwilling, and not bound, to retain it under their own management, application may very properly be made to the Court, for authority to grant a suitable lease, where the consent of the beneficiary cannot be obtained, from less age or other incapacity, or reluctance to interfere.

CHAPTER VI.

DUTIES AND OFFICE OF TRUSTEE IN TRUSTS FOR CREDITORS.

Under whom office held.

THE distinction between trusts for family purposes, that is, for the superintendence of the affairs of a solvent party; and trusts for the extrajudicial settlement of bankrupt-estates, is, — that in the former, as has been observed, the trustees, are in place of the truster, and accountable to him alone, or to his representatives, and must denude, if desired by the truster, on being indemnified; in the latter, the trustees are accountable to the creditors. The trustees hold the estate for behoof of the creditors, — are bound to sustain their title; and notwithstanding that the truster is in law held not to be divested, yet he cannot, at his will, divest the trustees who hold, in opposition to him, for the behoof of the creditors, until fully discharged by them, the whole of these parties being mutually bound.

Must give Intimation.

In order to secure the estate as far as possible, trustees for creditors ought, immediately on entering on the office, to intimate the trust to all consignees and debtors of the truster,¹ and to adopt the usual measures for obtaining investiture in heritage or moveables.

Must free estate from liabilities.

It is the duty of the trustee, in such trusts, to get the estate free from future liabilities of every kind

¹ See Bell, 31st May, 1831, 9 S. 651.

as soon as possible. Thus he is bound to stop the currency of cautionary obligations to which the trustor may have subjected the estate, by intimating to the party for whom the trustor became bound, and to the creditors of the said obligation, that he, the trustee, has got an assignment of the estate, and that it will not thereafter be held liable for that obligation. Where the trustor has been engaged in partnership or trade of any kind, unless the trustee shall be authorized by the creditors to carry it on for behoof of the estate—in which case his authority flows from the creditors, and a new trust is virtually created *quoad* that particular act, and his relief thereby secured against the acceding creditors—it is his duty to put an end to the connection of the estate with the trade or copartnery in question, so as at once to put a stop to future liability. The same rule is applicable to joint adventure; but if all the requisite advances have been made, the trustees may wait the result without any special interference, and claim the trustor's share of profit, if profit have been gained, and rank the joint adventurers for the trustor's share of the loss, if loss have occurred. He must, in like manner, be especially guarded as to taking investiture of heritable property of the trustor, involving onerous obligations to third parties, as obligations for feu-duties, erecting buildings, &c., or of leases held by the trustor, as by doing so the most serious liability may be incurred by himself, the trust-estate, and the creditors.

The general duty of trustees, in private trusts for creditors, anterior to the sale or subdivision of the estate, and to all questions of preference of claims, is to manage the estate for their behoof in General duties.

the same manner as in a trust for family purposes, that is, to draw rents, grant leases, and to do whatever is necessary for the preservation of the estate, and to lodge in a bank the funds of the estate as soon as realized, &c.¹ but to pay no debts, and to incur no new obligations whatsoever, without the express authority of the creditors. Thus, where trustees were appointed for managing a bankrupt estate, on which there were heritable debts, and houses unfinished, and they, without full accession by the creditors, proceeded to borrow money, and finish the houses,—it was held, that no power was given by the trust-deed to borrow money, or make advances on the faith of acceding creditors, and that the plain intention was, that the estate alone should answer for any necessary engagements; that there was no full accession of the creditors, and no authority given to make advances; that the benefit of the advances had accrued to the heritable creditor only, and therefore, that the creditors were not liable to the trustees for repayment of their advances, or relief of their engagements.² Where special powers are given, as over the debtor's person, or otherwise, the trustee must, of course, deal with these in strict compliance with the terms in which they are specially conferred.

¹ In an old case, *Trustees of Johnston's Creditors v. the Creditors*, 4th Jan. 1738, M. 558, the report bears, that a debtor having conveyed his effects to certain trustees, to be converted into money for the behoof of his creditors, the trustees, in counting with the creditors, were found not liable for annual-rent of the sums that from time to time came into their hands during the course of their management. But this case is too general and vague to be of any authority in this respect, and, moreover, is inconsistent with the rules as to liability now established. See *sup.* page 106.

² *Sprot*, 29th Jan. 1836, 14 S. 382; see also *Bell*, 19th Nov. 1842, 5 D. 162, and *inf.* part 2, c. 8, s. 1, 2.

So, also, where certain rules of superintendence and administration are stated, or referred to by the deed, as, that the trust-affairs shall be conducted in accordance with the rules and provisions of the sequestration acts, such must be strictly complied with.

Where no provision is made in the trust-deed, or deed of accession, with regard to the determination of claims and preferences of the creditors, and disputes arise as to these, recourse must be had to judicial procedure. It is usual to have recourse to a multiplepoinding where there is any doubt as to the amount of the claim on the estate, and where there is reason to suppose that there are parties who have claims against it, but who have not appeared to state them. In such a case the Court will order intimation of the process to be made in various newspapers, and will not at once sustain the right of the pursuer as trustee, but will generally order the dividend due to each of the creditors to be ascertained as far as possible, and appoint it to be lodged in a bank, and certification intimated in the advertisements, that these dividends will be distributed among those creditors who have entered claims, unless farther claims shall be entered within a certain time.¹ But where a trustee for creditors raises an action of multiplepoinding, and calls parties as creditors of the common debtor, he is not entitled to dispute their title to appear and object to his condescendence of the funds; and he is not entitled to deduct from the sum to be consigned, payments made to the debtor for aliment, without the authority of the creditors.²

Determina-
tion of claims.

¹ Macfarlane, 12th Dec. 1823, 2 S. 578. See also *supra*, page 110.

² Lang, 18th Nov. 1826, 5 S. 21.

CHAPTER VII.

DUTIES OF TRUSTEES AS REGARDS THE SALE OF TRUST-
PROPERTY, AND RIGHTS AND INTERESTS OF PUR-
CHASERS.

Distinction
between
powers and
purposes of
sale.

SALES of trust-property by trustees, take place under two circumstances, — 1st, Where a power of sale merely is given ; and, 2^{dly}, Where the sale of the trust-property, or a part of it, is a purpose of the trust.¹ Questions as to powers of sale are, however, to be interpreted according to the rules applicable to powers generally,² and fall to be considered here in relation to the duties of trustees in special cases. One general rule as to these, however, is, that the payment of debts must always be a primary object, whereas, legacies may not necessarily be so.³ It is with regard to questions of succession, therefore, that this is of importance ; and, as has already been observed, such powers are special but conditional powers.⁴

Duties under
powers of sale.

Before proceeding to sell heritage, where power merely is given to sell in the event of certain circumstances rendering it necessary to do so, trustees ought to ascertain fully, and as conclusively

¹ As to the distinction between a power of sale and a purpose of sale, see *inf.* part 3, c. 2, s. 1.

² See *sup.* part 2, c. 4, s. 3.

³ *Campbell's Trustees*, 4th Dec. 1838, 1 D. 153, see *sup.* page 151.

⁴ See *sup.* page 136.

as possible, the nature and amount of the claims on the estate, whether these shall arise from proportional or conditional claims under the deed, or other circumstances, as it is the necessity which will alone justify the sale. They hold the heritage for the heir in that kind of property, and are as much bound to preserve it entire, as to secure the rights of the heirs in moveables. If, therefore, there be difficulty in determining as to the claims, they are bound to wait till such be adjusted, and to avail themselves of every other circumstance to preserve the heritage entire. Every thing, of course, depends upon the special circumstances of the case in question, and the amount of the deficiency in moveables, for the payment of the burdens, which deficiency is to be made up by the sale of heritage. Where the deficiency is small, or, at all events, such as not to preclude a possibility of the burdens being cleared off in a moderate time, and creditors or beneficiaries consent, then it is the duty of the trustee to continue to hold the estate entire, with the view of clearing off the burdens.¹ If the heir in heritage be willing to take upon himself the burden, then they may convey the property over to him; but if they do so, they must either see that the beneficiary actually clears them off at once, or enters into a binding arrangement for doing so, or the trustees must get a full and final discharge from all interested, with full security for such claims as may have been overlooked. And

¹ It has been held, in England, that where an estate is devised to trustees, charged with debts, and subject thereto, upon trust for certain parties, the trustees may, for the purpose of paying the debts, more properly mortgage than sell, *Ball v. Harris*, 4 M. and Cr. 264; although a trust for sale alone will not authorize the execution of a mortgage, *Haldenby v. Spofforth*, 1 Beav. 390.

where it appears to the trustees that it is necessary to sell, but the heir disputes it, and opposes the sale, then the proper course, as in all questions of disputed interest under trust-deeds, is for the trustees to apply to the Court, in order to have the point at once settled, and themselves exonerated.

Duties under
a purpose of
sale.

As has been already observed, in considering the subject of the interpretation of powers,¹ in unconditional trusts for sale,—that is, where the trustees are required to execute the powers intrusted to them,—their powers are liberally interpreted, so far as regards the sale of the property. And so much is it the policy of the law to secure the immediate payment of creditors, that it will not allow the trustees to be interfered with in carrying the purpose of the trust into execution, unless good grounds shall be shewn for doubting the propriety of the proceedings on the part of the trustee. Accordingly, in a trust, with powers of sale for payment of the trustor's debts, for which the trustee had to a great extent become personally bound, it was held, that he was not obliged to postpone a sale on a mere intimation that the trustor was to put an end to the trust, in terms of the trust-deed, by relieving him of his obligations, he shewing no means whereby he was to accomplish this.² And where a non-acceding creditor to a voluntary trust for behoof of creditors had rendered the debtor bankrupt, avowedly to reduce the trust-deed, and executed a summons of reduction against the trustees before the second day of the sale, which lasted for a week thereafter, it was held, that, as he had not attached the trust-funds

See *susp.* page 149.

² *Tender*, 17th November, 1831, 10 S. 19.

by any diligence, nor intimated any interdict of sale, the trustees were entitled to sell the trust-estate by auction, without incurring any other responsibility than that of accounting for the trust-funds.¹ So, also, where a trustee who was infest had made large advances for the truster, and, in virtue of powers of sale, advertised the lands to be sold, and a bill of suspension was presented by a party on the ground of a minute of sale entered into with the truster, under which a large amount of the price had been consigned, but the trustees had made large advances, it was replied, that there was no satisfactory security to the trustee, and that the trust was for the general creditors, and the alleged sale at a very inadequate price; and the Court held, that as the trustee did not concur in the bargain, there could be no interdict.²

In order to prepare for a sale, it is specially necessary to fix upon an upset price, or the sum which the trustee is willing to accept of as the price of the property. For that purpose, the trustee ought to consult persons of skill acquainted with the price recently obtained for lands in the district,³ and to retain evidence of the correspondence he has had, and the opinions given to him on the subject. All this is requisite, because, by the practice of Scotland, the party who at the sale offers what is styled the upset price, and subscribes his offer duly attested, becomes purchaser, if no higher offerer appear. The sale may be made upon any reasonable and usual conditions

Practical con-
ducting of
sales.

¹ *Stubbe and Co.*, 24th June, 1826, 7 S. 790, *sup.* page 124.

² *Ker*, 27th January, 1837, 15 S. 425.

³ See *Eng. Ca. of Oliver v. Court*, 8 Price, 165; *Campbell v. Walker*, 5 Ves. 680; *Conolly v. Parsons*, 3 Ves. 628, note; 1 *Sugden's Vend. and Purch.* 86, 10th ed.

of sale which the trustees shall consider necessary;¹ but of course it must not be clogged by unnecessary restrictions.² It would seem that they may sell in lots, if thought desirable for the interest of the trust-estate.³ They ought to take care that the whole details of the trust are properly arranged and provided for, and not to interfere with the sale when in progress, as by buying in, or otherwise. Thus, where an estate had been devised in England upon trust to sell, and soon after the testator's death, the trustees put up the property to auction, and L.6000 was bid, but one of the parties interested desiring it might not be sold under L.7000, the property was bought in, and was afterwards sold by the trustees for L.3600, they were held responsible for the consequent loss to the estate.⁴ It was observed by Sir J. Leach, that if the sale be made with all the circumstances of caution which a provident owner would have applied in the case of his own property, it could not be a breach of trust that the estate did not produce a full price, for the nature of an auction is, that the adequacy of price shall be submitted to the chance of competition.⁵ In other respects, the ordinary style of the deeds called articles of roup afford sufficient instruction concerning the formalities to be adopted on such occasions.⁶ In England, it seems to be held, that the purchaser should not be

¹. See Eng. Ca. of Hobson *v.* Bell, 2 Beav.

² See Eng. Ca. of Wilkins *v.* Fry, 2 Rose, 375, S. C. 1 Mer. 268.

³ See Co. Lit. 113, a; Ord *v.* Noel, 5 Mad. 438; and see *ex parte Lewis*, 1 Gl. and J. 69.

⁴ Taylor *v.* Tabrum, 6 Sim. 281; and see L. on T. 335.

⁵ Ord *v.* Noel, 5 Mad. 440; but see Conolly *v.* Parsons, 3 Ves. 628, note.

⁶ As to conditions and articles of roup, see cases cited *inf.* page 255, note 1, and Johnston's Trustees, 19th Jan. 1819, F. Heddle, 30th May, 1823, 2 S. 350; Mackenzie, 19th Dec. 1840, 3 D. 318; Robertson, 22d Jan. 1835, 13 S. 289.

let into the possession of the estate, until the completion of the sale by payment of the full purchase-money.¹ But in Scotland, part of the price is frequently reserved as a burden on the estate sold, as it is the means, in many instances, of facilitating sales; and, as being both safe and convenient, may very properly be adopted by trustees, where the whole fund is not immediately required.

The usual forms must be strictly adhered to, even in respect to the time allowed for offerers to come forward. Thus, if the articles of roup mention, as usual, the running of a half-hour sand-glass, that instrument must be employed.² As soon as an offerer appears, the instrument is layed on its side, while the offerer subscribes his offer, and his subscription is duly attested by witnesses. The glass is then placed upright, so as to allow the sand to run, and this formality is repeated at every case of a new offer of an addition to the price, so that the sale may in fact occupy a considerable length of time, while the half hour, as measured by the running of the sand, still remains current, although repeatedly interrupted. The roup is not ended, or the price and purchase fixed, till the last grain of sand has fallen, after which it will remain necessary to adjust the stipulated securities for fulfilment of the offer finally made, which is truly not legally an offer by the purchaser, but an acceptance of the offer of the seller, to convey the property in return for the upset price, augmented, as it may be, by the last and highest offer at the auction.

¹ Oliver v. Court, 8 Price, 166, per C. B. Richards.

² *Ex parte Burns*, 27th Nov. 1807, F.

Special stipulation.

A stipulation has of late years been frequently introduced into articles of roup, declaring that intending purchasers are to be understood to have satisfied themselves concerning the regularity and validity of the title of the trustee and his author, as proprietors of the lands offered for sale ; and that the offerers at the roup shall be understood to have agreed to rest satisfied with a conveyance of the right existing in the trustee and his author. It has happened that this stipulation has given rise to various disputes, when purchasers discovered, or conceived that they had discovered, defects in the progress of titles to the lands, and on that footing refused to make payment of the price. In such cases, the seller, on the one hand, relied on the stipulation contained in the articles of roup, while on the other hand, purchasers generally stated circumstances tending to suggest an opinion that the title-deeds had not been sufficiently laid open to all and sundry; and where suggestions of that sort failed, they pleaded ignorance or error concerning the defect in the titles, and urged the absurdity and injustice of requiring a purchaser to pay the price of a subject which is not effectually delivered to him, seeing it is not delivered with the protection of safe titles ; and that this argument is conclusive in Scotland, on account of the system of public records, in consequence of which every owner of heritable property has it in his power to ascertain the validity of his titles, and has no right to propose to grant a conveyance which is not completely secure.

When purchaser in safety to pay price.

In the case of sales of heritage by trustees, the question frequently arises, When is the purchaser in safety to pay the price ? In the first place, the

trustee is bound to give the purchaser a good and valid title;¹ and secondly, the general rule is, that a *bona fide* purchaser from a trustee is not bound to see to the application of the price.² But in order that a trustee shall have the power of giving a title free from liability to eviction, it is necessary, not only that his author, the trustor's, title shall be feudally correct, but that the trustee's title and power of disposal shall likewise be valid and unencumbered. This depends on the nature of the deed of conveyance to the trustee. If the conveyance be in the form of an absolute disposition, qualified by a private back-bond of trust, then the trustee has full and unfettered power of disposal, and may give a good title to a purchaser, provided the trustee's title be followed by infestment.³ But if the deed of conveyance contain the declaration of a trust *in gremio*, then the validity of a conveyance by the trustee will come to depend on whether the sale be made under a declared purpose of sale, or under powers merely. Where the sale is made under positive directions to sell, the purchaser is safe. Where, however, the power of sale depends upon the fulfilment of a condition, as for payment of debts, legacies, or other burdens, the trustee has

¹ Dick, 12th Dec. 1826, 2 W. S. 522; Forbes, 2d Feb. 1808, M. *Solidum et pro rata*, App. No. 3; Lockhart, 16th Nov. 1827, 16 S. 76; Waddell, 19th June, 1828, 6 S. 999; Mitchell, 27th Nov. 1827, 6 S. 135; Ralston, 17th June, 1830, 8 S. 927; Brown, 6th Dec. 1833, 12 S. 176; Robertson, &c. 11th Dec. 1840, 3 D. 213; Cheyne, 19th Jan. 1831, 9 S. 302; and see Eng. Ca. of White v. Foljambe, 11 Ves. 343, 345, per Lord Eldon; Edwards v. Harvey, Coop. 40; and Sugden's Vend. and Purch. 86, 10th ed.

² Dewar, 4th Dec. 1792, Bell's Ca. 541, 8vo.

³ Anderson, 14th Nov. 1702, M. 10213; Workman, 2d November, 1672, M. 10208; McCubbin, 20th July, 1715, M. 10215; Rae, 5th February, 1680, M. 10211. As to latent trusts see *sup.* page 232.

no power or authority to sell, unless these conditions shall be strictly fulfilled, and, therefore, the purchaser cannot be in safety from eviction, unless he shall ascertain that these conditions of the trust-deed of conveyance have been complied with.¹ With a view to prevent the occurrence of such questions, which are liable to arise in the case of minor beneficiaries and others, where the consent of all interested cannot be obtained to the sale, the course has been adopted, of a double title,—by the trustee granting a conveyance to the trustee, with positive directions to sell, and at the same time granting another deed, containing the conditions and purposes of sale, so that the deed containing the directions to

¹ Brown, 21st Nov. 1673, M. 10209; Gordon, 6th July, 1676, M. 9167. So also, by the law of England, if a testator direct a sale of his real estate for payment of debts, on the insufficiency of the personal assets, it is held, that as the purchaser has no means of investigating the accounts, he is not to be prejudiced should it be proved that eventually the personal is sufficient, Culpepper v. Aston, 2 Ch. Ca. 115, per Lord Nottingham; Keane v. Roberts, 4 Mad. 356, per Sir J. Leach, Co. Lit. 290, b, note by Butler, sect. 14; Shaw v. Borrer, 1 Keene, 559; but see Fearne's, P. W. 121. But if a testator give a power of sale to his trustees, on the insufficiency of the personal estate, then the purchaser must, at his peril, ascertain that the power can be exercised, Culpepper, *ut sup.* 116, 223; and see Walker v. Smallwood, Amb. 676. The difference between a trust and a power is, that in the former case the trustees having the legal estate, can transfer it to the purchaser by their ownership; and equity, as the purchaser had no opportunity of discovering the real state of things, will not impeach his title. But where there is a power merely, the insufficiency of the personal estate is a condition precedent; and if it did not pre-exist, in fact, the power never arose, and the purchaser took nothing by the pretended execution of it; see Lewin on Trusts, 340. It is also held, in England, that if a trustee, or those who act by his authority, fail in reasonable diligence in the management of the sale, as if he contract under circumstances of haste and improvidence, or continue to advance the interests of one party at the expense of another, the Court will refuse to compel the specific performance of the agreement at the instance of the purchaser, however justifiable his conduct may have been; Ord v. Noel, 5 Mad. 440, per Sir J. Leach; Turner v. Harvey, Jac. 178, per Lord Eldon; Bridger v. Rice, 1 Jac. and Walk. 74; Mortlock v. Buller, 10 Ves. 292; and see Hill v. Buckley, 17 Ves. 794.

sell, being alone produced to the purchaser, his title is rendered complete.

Another method, sometimes adopted, has been for the deed to contain a provision or clause, declaring that the purchaser shall not be bound to see to the application of the price.¹ But this latter course is by no means calculated to attain the end in view; for where the sale was properly and necessarily made, it would be superfluous, in whatever way the trustee should dispose of the price; and where improperly and unnecessarily made, it could likewise be of no avail, for the purchaser's title would be defective, in whatever way the trustee should dispose of the price.

In the law of England, the question frequently arises, Supposing the sale to be proper, is the purchaser bound to see to the application of the purchase-money? In referring to it as an authority or illustration in our law, it is necessary to observe this important distinction, that the general rule in the law of England, arising from the nature of the equitable or beneficial interest, is, that if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability, except by payment or transfer to the rightful owner. As previously remarked,² if an estate be vested in A upon trust to sell, and divide the proceeds between B and C, in a court of law the absolute ownership is in A, and his receipt will therefore discharge the purchaser; but in equity, B and C, the cestuique trust, are the true and beneficial proprietors, and A is merely the instrument for the execution of

Question in
law of Eng-
land.

¹ See Cockburn, 4th June, 1826, 14 S. 889.

² Sup. page 7.

the settler's purpose ; the receipt, therefore, must be signed by B and C.¹ But with us the beneficiary having merely a personal right of action, and the trustee having the absolute ownership, the latter may grant a discharge, which will be as effectual as that of any other owner, provided the sale be made in compliance with all conditions which are contained in the trust-deed. As in England, therefore, a power of sale does not necessarily imply a power of discharge for the price; such power may of course be granted by the deed, which power or intention is either express or implied; and therefore a clause similar to that mentioned above is frequently used, and is highly valuable in England, and, where wanting, numerous questions arise as to what is a good discharge.² The doctrine of purchase from a trustee, with or without notice, in the English law, is equivalent to our distinction of trust *in gremio*, and absolute conveyance with back-bond of trust. Thus, in England, if a purchaser of an estate, at its full value, take with notice of the trust, he is bound to the same extent, and in the same manner, as the person of whom he purchased.³ But if the *bona fide* purchaser have not notice, his title, even in equity,

¹ See Lewin on Trusts, 341, 342.

² Ibid. 342, *et seq.* and 352.

³ Dunbar v. Tredennick, 1 B. and B. 319, per Lord Manners; Burgess v. Wheate, 1 Ed. 195, per Sir T. Clarke; Bovey v. Smith, 1 Vern. 149; Phayre v. Perez, 3 Dow, 129; Adair v. Shaw, 1 Sch. and Lef. 262, per Lord Redesdale; Wigg v. Wigg, 1 Atk. 382; Mead v. Lord Orrery, 3 Atk. 238, per Lord Hardwicke; Mackrell v. Symmons, 15 Ves. 350, per Lord Eldon; Mansell v. Mansell, 3 P. W. 681, per Cur.; Willoughby v. Willoughby, 1 T. R. 771, per Lord Hardwicke; Verney v. Carding, cited Joy v. Campbell, 1 Sch. and Lef. 345; Fleming v. Page, Rep. t. Finch, 320; Powell v. Price, 2 P. W. 539, admitted; Backhouse v. Middleton, 1 Ch. Ca. 173, S. C. Id. 208; Kennedy v. Daly, 1 Sch. and Lef. 355, and Bell v. Bell, 1, Rep. t. Plunkett, 44.

cannot be impeached.¹ The trustee is therefore bound to give notice; and if he dispose of the trust-estate to a purchaser for valuable consideration without doing so, he is responsible to the cestuique trust.² This rule, that a *bona fide* onerous purchaser is safe, does not always apply in Scotland as regards heritage, as above stated, but only in the case of moveables, which difference in the law of the two countries arises from the effect of the system of records in Scotland, giving the ready and conclusive means of ascertaining incumbrances.

In unconditional trusts for sale,—that is, where the trustees are required to execute the powers intrusted to them, or where the sale has become absolutely necessary, in order to fulfil the purposes of the trust,—it is their duty to proceed with the sale as soon as they can do so with justice to the interests of the estate.³ Thus, where the sale is of lands, they must proceed, notwithstanding difficulties arising as to the manner of making up titles.⁴ Where sales are made by factors under powers of sale, the trus-

At what period sales to be effected.

¹ Burgess, *ut sup.* and Id. 246, per Lord Henley; Millard's Case, 2 Freem. 43; Mansell, *ut sup.*; Willoughby, *ut sup.*; Dunbar, *ut sup.* 318; Trevor v. Trevor, 1 P. W. 633; Harding v. Hardrett, Rep. t. Finch, 9; Cole v. Moore, Mo. 806, per Cur.; Jones v. Powles, 3 M. and K. 581; Payne v. Compton, 2 Y. and C. 457.

² See Mansell, *ut sup.*, and Attorney-General v. East Retford, 2 M. and K. 25; but see Denton v. Davies, 18 Ves. 504.

³ They are of course bound to bring it to sale under every possible advantage to all concerned; Downes v. Grazebrook, 3 Mer. 208, per Lord Eldon; Ord v. Noel, 5 Mad. 440, per Sir J. Leach; and see Anon. case, 6 Mad. 11.

⁴ Darling, 24th Feb. 1837, 15 S. 672. In England, it is held that such expressions as direct sale to be made "with all convenient speed," implies nothing more than the reasonable time expected by law, and does not render an immediate sale imperative; Buxton v. Buxton, 1 M. and C. 80; Garret v. Noble, 6 Sim. 504; and see Fitzgerald v. Jervoise, 5 Mad. 25; nor does the expression, "at such time and in such manner as the trustees shall think fit," authorize them to postpone it to an indefinite period. See Walker v. Shore, 19 Ves. 391; Hawkins v. Chappell, 1 Atk. 623.

tees are bound by them, and must grant a disposition to the purchaser, or repeat the price paid, with the value of such repairs as have been laid out upon the estate by the purchaser.¹

Warrantice.

When trustees have agreed to sell heritable property, and to grant a disposition and absolute warrantice, they are bound to give a clause of warrantice, binding the trustee absolutely, and themselves against their own acts and deeds.² Thus, where the private trustee of a party who was rendered bankrupt within sixty days of the trust-conveyance made a *bona fide* sale of trust-heritage which was free of burden, but it was alleged that all the creditors did not concur in the trust, it was held that the purchaser, being offered warrantice against the trustee absolutely, against the trustee from fact and deed, and against the creditors to the extent of the portions of the price drawn by them respectively, was entitled to no other warrantice.³ Where such warrantice is given, and the property is evicted from the purchaser, he has a claim against trust-funds remaining extant and unappropriated in the hands of the trustees, and the claims of personal creditors of the trustee cannot compete on the trust-funds with the purchaser.⁴

**Private bar-
gain or public
auction.**

Trust-deeds very generally empower the trustee to make sales of heritage either by private bargain or by public auction.⁵ Where creditors have used inhi-

¹ Thomas, 4th July, 1839, 7 S. 828; Do. 4th Dec. 1832, 11 S. 162.

² Forbes' Trustees, 15th June, 1822, 1 S. 497. See, however, duties of trustees as to taking investiture, *sup.* page 219; and see *inf.* pages 271, 272.

³ Head, 9th June, 1831, 9 S. 925.

⁴ Agnew, 27th Feb. 1833, 11 S. 447.

⁵ So also in England the general rule is, that trustees shall adopt whatever form seems most advantageous to the estate. See *ex parte* Dunman, 2 Rose, 66; *ex parte* Hurley, 2 D. and C. 681; *ex parte* Ladbrooke, 1 Mont. and A. 384.

bition previous to the date of the trust, the trustee is not safe to sell the estate by private bargain, as the inhibitor would thus acquire a preference from his power of adjudging.¹ Nor is accession alone sufficient, unless the inhibitor shall renounce his preference, for a reservation of preference will be effectual, notwithstanding accession to a deed with powers of sale.² Where there is a full accession of creditors, the trustees, acting *bona fide*, may safely exercise a discretionary power in the adoption of either form. But in that case a prudent trustee will scarcely venture to dispose of heritable property, without, in the first instance, making trial of the success of a public roup, preceded by full advertisements.³ And, as a general rule, intimation of the intention to sell should be specially given to all interested under the trust-deed, or as heirs or successors of the truster, in order to prevent questions subsequently arising as to the necessity or conduct of the sale.

Where a purchaser of trust-property has recourse to legal diligence, the difference between such diligence and a voluntary conveyance is, that in the former the Court can convey nothing but what the seller has, — in the latter, the purchaser takes upon the faith of the records. Thus, where a disposition was granted for the behoof of the disposer, but in the terms of an absolute conveyance, and the donee granted heritable security over the property to creditors of his own, it was held, that the convey-

¹ Monro, 19th July, 1777, M. Inhibition, App. 1; M'Lure, 19th Nov. 1807, M. Competition, App. 3.

² The same course is adopted in England; see Pechel v. Fowler, 2 Anst. 549, but see Anon. Case, 6 Mad. 10.

³ Russell, 16th Jan. 1821, F.

Effect of legal
diligence by
purchaser.

ance was effectual, but that the adjudgers took only *tantum et tale*.¹

Inhibition by creditor. Where the greater number of a bankrupt's creditors had agreed to accept of a voluntary right from the bankrupt in favour of a trustee, who, to save expense, should be empowered to sell and divide the price, the subject being actually sold, and the price *in medio*, an inhibiter who refused to accede to the trust-right was not allowed to reduce, in respect he could not allege the sale was at an under value, and that the fund was *in medio*.²

¹ Thomson, 15th Nov. 1786, M. 10229. But see M. 10298; and see Ersk. Inst. by Ivory, b. 2, t. 12, s. 36, note 352, where it is stated, that "the doctrine of *tantum et tale*, so far as regards the original appraiser or adjudicator, is now exploded." This seems erroneous; see *infra*, part 3, c. 8.

² Carlyle, 1st Feb. 1739, M. 6971.

CHAPTER VIII.

LIABILITIES OF TRUSTEES IN PRIVATE TRUSTS.

The subject of liabilities generally may be divided into,

- I. Liabilities, where the acts of trustees are competent.
 - 1. Of trustee, *qua* trustees, primarily and individually.
 - 2. Of the trust-estate considered as a fund of relief to the trustees, and of security to the creditors.
 - 3. Of constituents, viz. of the trustor, beneficiaries, or acceding creditors.
 - II. Liabilities, where acts of trustees are illegal, *ultra vires*, or incompetent.
 - 1. Where the trustees fall short of their duties.
 - 2. Where they exceed their powers.
 - 3. Where they commit rash or improper acts.
 - 4. Where they do incompetent acts.
 - III. Limitation of liabilities.
 - 1. Under the principal of *bona fides*.
 - 2. From special reservations or exemptions contained in the trust-deed.

SECTION I.—LIABILITIES WHERE THE ACTS OF TRUSTEES ARE COMPETENT.

Liability of trustees *qua* trustees primarily and individually.

1. The general rules regarding the liability of trustees are, 1st, that they are to be indemnified as regards all acts done in compliance with the terms of the trust ; 2^d, that they are not liable for more than the estate will produce ;¹ 3^d, that, unlike executors, they are liable for the acts of their co-trustees.² On the principle of indemnity, claims against the trust-estate are entirely distinct from claims arising from the actings of the trustees ; and as trustees, binding themselves only *qua* trustees, are not personally liable,³ they may therefore be said to be privileged in regard to claims on the estate, in virtue of its distinct and special character. Thus, in the case of Lyon *v.* Sibbald's Trustees,⁴ where a party had died indebted to another, and his trustees employed the creditor on behalf of the trust-estate, and made remittances to him, to be put to their account in respect of that employment, became indebted to him, and accounts were rendered by him, in which the balance of the original debt was put to their debit ; it was held, that the trustees were only liable *qua* trustees for that balance. A trustee does

¹ E. of Northeak, 5th January, 1675, M. 16172, 1 B. Sup. 549 and 720.

² In the law of England, in which trust and executry are more allied to each other than in the law of Scotland, trustees are not, as a rule, liable for the acts or defaults of their co-trustees, whether a proviso to that effect be inserted in the trust-deed or not. See *inf. s. 3, No. 2, h. t.* But this is the general rule merely, for in the case of a special duty requiring the joint concurrence of all the trustees, as in trusts for sale, trustees are liable for the acts of their co-trustees. Oliver *v.* Court, 8 Price, 166, per Lord C. B. Richards ; In re Chertsey Market, 6 Price, 285, per eundem ; and see L. on T. 329.

³ Campbell, 21st Feb. 1840, 2 D. 639 ; Clark, 16th May, 1823, 2 S. 313.

⁴ 16th December, 1823, 2 S. 591.

not become liable for interest of funds conveyed to him for the purposes of management and administration, until after the lapse of one year from the time he enters upon the administration of his office, as that period is necessary for ascertaining the nature of the estate, and the amount of its liabilities.¹ Where depositing in a bank is all that is required from the nature and provisions of the trust, he will only be liable for the current bank interest from that time. Where he is directed to invest funds, but not specially directed to accumulate the proceeds, he will be charged with simple interest only,² but, after the lapse of a reasonable period, he will be liable to be charged with five per cent. But in whatever manner the trust-funds have been employed by the trustee, whether in trade or otherwise, he must account for the whole actual profits.³

It is to third parties, or to the trust-estate, that ^{Third parties.} trustees incur liability ; to the creditors of the estate they only become liable when loss is incurred by them from mal-administration. Thus, in the case of Lyon already mentioned, the creditor was not a third party, *quoad* his claim on the trust-estate, for debts incurred by the trustee, for in regard to them, the trustees were acting for the creditors. In acts by trustees affecting the public, — that is, parties who have no connection with the trust, but who are simply employed by them, trustees are not official, but simply private individuals, employ-

¹ See Eng. Ca. of Forbes *v.* Ross, 2 Cox, 115, per Lord Thurlow ; Flanagan *v.* Nolan, 1 Moll. 85, per Sir A. Hart.

² In England, he is charged with simple interest at four per cent. ; Rocke *v.* Hart, 11 Ves. 58. Ashburnham *v.* Thompson, 13 Ves. 402. See Tebbs *v.* Carpenter, 1 Mad. 305 ; Crackelt *v.* Bethune, 1 J. and W. 586.

³ See *sup.* page 109. See Eng. Ca. of Tebbs *ut sup.* 304, per Sir J. Plumer ; Lee *v.* Lee, 2 Vern. 548 ; Adye *v.* Feuilleteau, 1 Cox, 24 ; Piety *v.* Stace, 4 Ves. 622, per Lord Alvanley.

ing them to do certain acts, and are therefore directly liable, and must guarantee funds to implement these obligations. Accordingly, where one of two private trustees obtained the title-deeds of the trust-estate from a law agent who had a hypothec over them, and granted, on behalf of himself and co-trustees, an obligation to see the agent paid out of the estate, and the co-trustee homologated this act, he was held liable to the agent, although he alleged that he had received no part of the trust-funds.¹ His not having intromitted with the trust-funds was of no consequence, for, where a party accepts of a trust, and allows his name to be used in the management, he becomes liable not only for his own acts and intromissions with the funds, but also for the acts and intromissions of his co-trustees, although he personally have not intromitted with the funds in any way.² But the mere signing of an act of assumption of a trustee, does not render the subscriber liable for transactions under the trust.³

*Building
speculations.*

A trust-deed has been executed by a professional builder, authorizing his trustees to erect buildings on the trust-property, with a view to profitablesales. The persons accepting such a trust, and erecting buildings, would be personally liable to find funds to pay third parties furnishing materials and workmanship, although, by a change in the state of the market, the new buildings should prove an unprofitable adventure. But individuals lending money to the trustees, with a knowledge of their situation, character, and the terms of the trust-deed, without demanding personal obligations from the trustees, would have

¹ Hamilton, 16th May, 1823, 2 S. 315.

² M'Clymont, 14th February, 1827, 5 S. 346; Kennedy, 28th June, 1827, 5 S. 852.

³ Blair, 28th Jan. 1836, 74 S. 161.

no farther security than the trust-estate might afford.

On the general principle now alluded to, private trustees for creditors, in litigating with third parties, are primarily liable for expenses, in the event of the opposite party being successful, although they allege that they have no trust-funds.¹ Nor are they entitled, in sisting themselves as trustees for a bankrupt litigant, to insert a qualification that they shall not be liable for the expense.² And in like manner, where trustees submit to arbitration a suit previously depending at the instance of the trustor, they are liable to the agent for his business account.³ So, also, where they oppose the claim of a creditor on the estate ineffectually, they are not entitled to relief from the party against whom they have so litigated, as they are representatives stating peremptory defences unsuccessfully, and so are liable for expenses.⁴

But though liable in litigating with third parties, trustees are not personally liable in defending the trust-deed, for in doing so they are simply fulfilling the duties of the trust,⁵ and are therefore not liable to have their private funds arrested.⁶ So, also, where trustees, in a case of difficulty, bring an action to ascertain the extent of their powers, they are not

¹ Robertson, 4th Dec. 1823, 2 S. 553, 1 W. S. 143 ; Scott, 21st Dec. 1826, 5 S. 172 ; Gibson, 25th May, 1833, 11 S. 656 ; Wyllie, 15th Nov. 1834, 13 S. 40 ; Clyne's Trustees, 8th Feb. 1840, 2 D. 554 ; Home's Trustees, 13th June, 1834, 12 S. 727 ; see also Muir, 14th Feb. 1843, 5 D. 579.

² Buchanan, 15th June, 1827, 5 S. 805.

³ Paterson, 4th June, 1824, 3 S. 103.

⁴ Cleghorn, 16th Jan. 1827, 5 S. 203 ; Carswell, 21st June, 1832, 10 S. 677 ; Jackson's Trustees, 31st May, 1832, 10 S. 597.

⁵ Dickson, 20th Nov. 1829, 8 S. 99 ; Fleming, 2d Dec. 1829, 8 S. 172.

⁶ Wilson, 27th June, 1840, 2 D. 1233. •

liable in expenses.¹ Nor are they personally liable for the expenses of process, in litigating for the purpose of realizing the trust-estate *bona fide*, and in a reasonable manner.² And it would appear that, in sisting themselves to a litigation in which expenses are ultimately awarded, trustees are not personally liable for those incurred before they became parties.³

*Liability for
factors, &c*

Where trustees appoint a factor, with special powers, they are bound to implement acts done by him.⁴ When acting within the powers granted to them, the acts of factors are as binding upon, and probative against, trustees, as their own proper actings. Thus, the benefit of the sexennial prescription of bills may be lost to trustees by markings made by their factor.⁵ They also incur serious liability if they do not superintend the actings of those employed by them;⁶ as, where a trustee was appointed factor, and the co-trustee neglected to see that a legacy was invested in terms of the deed, and allowed the money to remain in the hands of the factor, who died insolvent.⁷ But the general rule is, that where trustees do their own duty, they are not liable for the solvency of the factor, but are simply responsible for his having been habit and repute solvent at the time of his appointment.⁸ Where parties to be employed under the trust are named in the deed, the truster, whilst he avails

¹ Cundell, 14th Dec. 1822, 2 S. 89.

² Kirkland, 3d Feb. 1842, 4 D. 613.

³ Kidd, 17th May, 1828, 6 S. 825.

⁴ See *sup.* page 259.

⁵ Campbell, &c. 21st June, 1839, 1 D. 1061.

⁶ See *sup.* page 216.

⁷ Sym, 13th May, 1830, 8 S. 741.

⁸ Thomson, 16th Feb. 1838, 16 S. 560, and *inf.* s. 3. h. t. So, also, in England; *ex parte* Belchier, Amb. 220, per Lord Hardwicke.

himself of the services of a party in whom he places confidence, cannot, on the other hand, expect that the trustees, if they should choose to accept of the trust in such circumstances, are to be liable in the same degree as for a party appointed by themselves; the responsibility of the trustees will necessarily, therefore, be proportionally limited in such a case.¹

When trustees employ professional men to perform certain acts, or conduct matters of business, for behoof of the trust-estate, they are, of course, not liable for loss or injury caused by the unskilfulness or neglect of the parties so employed.² Where trustees for creditors had employed the trustee as manager of a coal work which he had conveyed to them, and he had been in the practice of accepting, drawing, and indorsing bills in his own individual name in relation to it, it was held, that the trustees were liable for payment of one of these bills, though their name did not appear upon it.³

But trustees are not bound by the acts of their agents, *ultra fines mandati*. Accordingly, where the law-agent for certain trustees lent a sum of money out of the trust-funds, on an heritable security taken to himself for behoof of the trustees, without having received special authority to that effect—and he thereafter went into an arrangement whereby he entered to possession of the subjects of the security, and bound himself, without reference to the trustees, for payment of feu-duties and public burdens—and, becoming bankrupt, granted to the trustees a

¹ See *sup.* page 131. See also English cases of *Kilbee v. Sneyd*, 2 Moll. 199, 200; and *Doyle v. Blake*, 2 Sch. and Lef. 239, 245.

² See part 3, c. 1, no. 2, and *inf.* part 4.

³ *Murray*, 28th Nov. 1827, 6 S. 147. See *inf.* part 4.

disposition and assignation of the securities, — it was held, that the trustees were not bound to implement the obligation for payment of feu-duties, and undertaken by the agent.¹

Non-accession
of creditors.

Trustees acting within their powers, and under a trust-deed not reducible, are safe under a trust for creditors, although there be no accession, and are consequently entitled to take credit for debts paid by them, although thereby a particular creditor get a preference.² Being entitled to full protection in the execution of their duty, they are free from liability in doing so, notwithstanding the importunities of interested parties.³ Thus, any one alleging mal-administration against a trustee, and failing to prove the fact, will be held liable in full expenses.⁴

Trustees
binding them-
selves per-
sonally.

Trustees binding themselves personally, as, for instance, to a bank, to repay whatever sums may be advanced for trust-purposes to a specified extent, are liable conjunctly and severally to fulfil the obligation.⁵ They will also render themselves personally liable to third parties, where they, for instance, accept a bill drawn by their factor, to raise money to carry on the business of the trust.⁶ Where they avail themselves of the special rights of beneficiaries, as by selling, with consent of the beneficiary, securities over heritage granted by a debtor in consequence of a bequest in the trust-deed, and grant an obligation, as a bill, to the beneficiary for the subject so assumed by

¹ Gordon, 26th Feb. 1839, 1 D. 577, Aff. 1, Bell's Ap. Ca. 428. See also Dalrymple, 4th Aug. 1784, M. 3534; Stevens's Trustees, 8th March, 1836. 14 S. 676, Aff. 1, Robin. 171.

² Pagan, 17th Jan. 1829, 2 S. 125.

³ See *sup.* pages 123 and 250.

⁴ Aitken, 16th May, 1832, 10 S. 535.

⁵ Commercial Bank of Scotland, 27th May, 1841, 3 D. 939.

⁶ Eaton, 25th May, 1837, 15 S. 1012.

them, they will be personally liable to the beneficiary, notwithstanding that the trustee's estate should ultimately be insufficient to liquidate all the claims upon it, although the deed contain a clause of protection of the most comprehensive nature.¹ For the beneficiary having become an onerous creditor in a preferable security over the property of the trustee's debtor, if the trustees avail themselves of that security, and intromit with the proceeds, the obligation by them is for value actually received by themselves. Again, where a trustee under a voluntary trust for creditors, entered into a transaction with the holder of an heritable bond, containing a power of sale, and considered by both parties to be a valid personal security, whereby the creditor agreed to abandon a sale which he had advertised, and was about to proceed with, on receiving from the trustee an obligation to pay his debt out of the first proceeds of the estate — and the trustee did not sell the property till some years afterwards, when the proceeds received proved insufficient to pay the debts in full — and the bond was found to be ineffectual as a real right, from an error in the instrument of sasine, — it was held, that notwithstanding, the trustee was not free from the transaction, which, as it was an obligation that he was entitled to give *qua* trustee, must bind his constituents, if not, he must perform it personally.²

The nature of the obligations of trustees is very clearly demonstrated by the case of a sale of heritable property, in which, where the trust is for family purposes, the trustee binds himself in warrandice

Special nature
of trust-
liability.

¹ Thomson, 24th June, 1829, 7 S. 787. See also a. 2, h. t.

² Grieve, 25th Jan. 1828, 6 S. 454.

against his own acts and deeds, and the trustee in absolute warrandice;¹ and in trusts for creditors, he binds himself in warrandice against acts and deeds, the creditors in warrandice for the amount of the price received by them individually, and the trustee in absolute warrandice. Here, those interested are bound according to their interest, but the trustee is simply bound personally, in guaranteeing that he has done no act interfering with the right conveyed, whereas, in cases such as those previously stated, the trustee is primarily bound to fulfil all obligations undertaken which affect third parties, and must therefore beware of doing acts as to which his indemnity is not secure. He is also, in the case of sales, bound *qua* trustee to give a good title;² thus, where a party purchased a property, and took the title in the name of his wife, and thereafter became bankrupt, and fled the country — and his wife, in his absence, conveyed the property to the trustee for his creditors, who exposed it to sale under articles of roup, by which he bound himself to execute and deliver to the purchaser a valid irredeemable disposition — and the purchaser objected that the title granted by the wife was inept, and refused to pay the price, — the Court of Session held, that the trustee was not bound to make any addition to the title at the expense of the bankrupt estate, but only at that of the purchaser ; but the House of Lords decided that the trustee was bound to give the purchaser a good and valid title, (and that the one

¹ Forbes's Trustees, 15th June, 1822, 1 S. 497 ; Read, 19th June, 1831, 9 S. 925. So, in England, trustees cannot be compelled to enter into any other covenant than against incumbrances by his own acts ; White *v.* Foljambe, 11 Ves. 345, per Lord Eldon ; and see Staines *v.* Morris, 1 V. and B. 12 ; and *s.v.p.* 260.

² See *s.v.p.* page 255.

which he offered was not good,) as by the law, both of England and Scotland, a person who purchases an estate has a right to a good and valid title, unless it be indisputably clear that he had waived his right.¹ Where there has been protracted delay on the part of claimants on the estate, and after the testamentary trustees have used every reasonable means of intimation to lodge claims, by advertisements and otherwise, and have ultimately disposed of the funds to legatees and others, there is a presumption of proper settlements of the funds having been made by them, and they will not be held accountable.² And in like manner, where trustees liable for factors by the conception of the trust, removed a factor for mismanagement, and the second factor also acted improperly, a legatee who had been dilatory in demanding payment, and to whom no funds now remained, was found not entitled to payment from the trustees, on the footing of liability for their factors;³ for the trustees had here acted to the best in their power, whereas the legatee himself had been negligent.

2. In trusts for family purposes, the liabilities of the trust-estate, and consequently the indemnity of the trustee, are measured by the powers conferred by the trust-deed. It is primarily liable for the expenses incurred in executing the trust. These are so various, that it is impossible to enumerate them specifically. They include, of course, the expense of making up titles, and conducting sales of property

¹ Dick, 12th Dec. 1826, 2 W. S. 522. See also Edwards v. Harvey, Coop. 40, and *sup.* page 255.

² Scott, 27th May, 1830, 8 S. 820; Thomson, 19th Nov. 1824, 3 S. 297.

³ Dalrymple, 4th Aug. 1784, M. 3534.

and other effects, the expense of law-agency in conducting judicial proceedings at home or abroad, the expense incurred by mercantile agents, brokers, and others, where maritime or mercantile goods and funds form a part of the estate, repairs of property, all necessary annual expenses, public burdens, &c.¹

Right of indemnity.

With regard to the indemnity of trustees, as already observed, the office of trustee is a gratuitous one;² and therefore, although they shall carry on the management of a trade or business for behoof of the trust-estate, no allowance can be made,³ unless such allowance shall be specially provided by the trust-deed.⁴ But such special allowance or remuneration for trouble will not affect their liability,⁵ nor exclude trustees from any competent claims for trust-expenses; as, for instance, from charging a factor's fee, where such an appointment has been necessary.⁶ The trustees may, as a condition of acceptance, make an agreement with the beneficiaries for an allowance for trouble, where they are unwilling to take the office otherwise. But such contracts are matters apart from the trust and its

¹ Lands mortgaged by a private individual, as a glebe, &c. to the minister of a parish, were held not to be tind-free; Wilson, 1st Feb. 1831, 9 S. 357.

² So also in the law of England; see *Robinson v. Pett*, 3 P. W. 251, per Lord Talbot; *Gould v. Fleetwood*, cited Ib. note a.; *How v. Godfrey*, Rep. t. Finch, 361; *Brockopp v. Barnes*, 5 Mad. 90; *Ayliffe v. Murray*, 2 Atk. 58; *In re Ormsby*, 1 B. and B. 189, per Lord Manners; *Charity Corp. v. Sutton*, 2 Atk. 406, per Lord Hardwicke; *Bonithone v. Hockmore*, 1 Vern. 316; *New v. Jones*, Exch. 9th Aug. 1833, cited 9 Jarm. Prec. 338, per Lord Lyndhurst; and see *Burton v. Wooley*, 6 Mad. 368.

³ See Eng. Ca. of *Burden v. Burden*, 1 V. and B. 170; *Brockopp v. Barnes*, 5 Mad. 90. But see *Marshall v. Holloway*, 2 Sw. 432.

⁴ *Robinson v. Pett*, 3 P. W. 250, per Sir J. Jekyll; *Willis v. Kibble*, 1 Beav. 559.

⁵ Home, 30th Nov. 1837, 16 S. 142.

⁶ See Eng. Ca. of *Wilkinson v. Wilkinson*, 2 S. and S. 237; and see *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

affairs, and are, and ought to be, by no means encouraged by courts of law.¹ An agreement with the Court as to allowance for trouble is held in England to be different,² and would also be different with us in the case of a judicial factor, who accepts in that capacity, though not competent to him as trustee.

The right of indemnity applies, without exception, to all expenses competently incurred in the trust-management.³ Thus, a trustee is entitled to all necessary expenses incurred in litigating; in which case his outlay is, of course, not to be judged of as in accordance with the taxed account between party and party, but according to the fair proportion of such expenses to a principal party.⁴ But this right of indemnity will, of course, not apply to cases where the litigation has arisen from improper conduct on the part of the trustee himself.⁵ In England it has been held, that he is not entitled to interest on expenses, although advanced by himself.⁶ Where the trustee neglects to keep regular books and accounts, the expenses incurred by him will be very strictly examined by an accountant, on a remit by the Court,

To what it
applies.

¹ See Eng. Ca. of Ayliffe *v.* Murray, 2 Atk. 58, per Lord Hardwicke; Moore *v.* Froud, 3 M. and K. 46, 48, per Lord Cottenham; and see Gould *v.* Fleetwood, cited Robinson *v.* Pett, 3 P. W. 251, note a.

² Brockopp *v.* Barnes, 5 Mad. 90, per Sir J. Leach; see Morison *v.* Morison, 4 M. and C. 215.

³ Eng. Ca. How *v.* Godfrey's Rep. 2 Finch, 361, *In re Ormsby*, 1 B. and B. 190, per Lord Manners; Hide *v.* Haywood, 2 Atk. 126; Caffrey *v.* Darby, 6 Ves. 497, per Sir W. Grant; Godfrey *v.* Watson, 3 Atk. 518, per Lord Hardwicke; Warral *v.* Harford, 8 Ves. 8; and see Dawson *v.* Clarke, 18 Ves. 254; Attorney-General *v.* Mayor of Norwich, 2 M. and C. 424.

⁴ See Eng. Ca. of Amand *v.* Bradburne, 2 Ch. Ca. 188; Ramsden *v.* Langley, 2 Vern. 536; and see Fearn *v.* Young, 10 Ves. 184.

⁵ Caffrey *v.* Darby, 6 Ves. 497.

⁶ Gordon *v.* Trail, 8 Price, 416.

in the event of dispute arising, which in such cases is very likely to occur, both as to competency and amount.¹ The trustee has in England been held entitled, likewise, to indemnity for extraordinary personal advances, made with a view to save the trust-property from a threatened evil.²

Right of re-tention.

Trustees being bound to carry the purposes of the trust into effect, and entitled to relief on doing so, and having a lien over the trust-estate, cannot be forced to cede funds belonging to the estate without indemnity, and security for all claims which may be brought against the estate over and above the funds remaining in their hands.³ Thus, where extrajudicial trustees of a bankrupt for payment of his debts, were ordained, in a multiplepoinding after the bankrupt's death, to assign to a factor *loco tutoris*, for his children, certain outstanding debts, they were only ordered to do so on receiving security against claims exceeding the fund in their hands.⁴ Where the disposal of certain trust-funds, over which the trustee had obtained the appointment of a judicial factor, was before the Court in a multiplepoinding, it was held that the factor was not entitled to demand that the funds in the hands of the trustee should be paid directly to him, but they were ordered to be consigned in a bank

¹ See Eng. Ca. of Hethersell *v.* Hales, 2 Ch. Rep. 156.

² See Balsh *v.* Hygham, 2 P. W. 455, per Lord King; and see Attorney-General *v.* Mayor of Norwich, 2 M. and C. 424; Quarrel *v.* Beckford, 1 Mad. 282; City of London *v.* Nash, 3 Atk. 516.

³ Innes, 18th Dec. 1828, 7 S. 206; Dickson, 19th June, 1829, 7 S. 772; Earl of Bedford, 18th Feb. 1662, M. 9135; Carse, 8th Nov. 1666, M. 16165; Clerk, 23d June, 1681, M. 16605; and see Eng. Ca. *ex parte* James, 1 D. and C. 272; Trott *v.* Dawson, 1 P. W. 780, B. P. C. 266..

⁴ M'Growther, 2d March, 1822, 1 S. 371.

in his name, and the receipt lodged in process.¹ Where the Court ordained a private trustee, who had been infest under a voluntary trust, to dispone in favour of a trustee under a supervening sequestration, a reservation was made of all rights, *hinc inde*.² So, also, where the Court authorizes payment to be made to the heirs of beneficiaries, who are presumed, though not proved, to be dead, caution to repeat in the event of the appearance of the beneficiary is invariably demanded.³ And a trustee is not liable for claims of tradesmen for ameliorations made by the truste upon an heritable subject over which the trustee has a right of retention.⁴ Trustees have also a right of retention over the funds of beneficiaries, for debts due to them, as for expenses of improper litigation, which expenses they have been held entitled to retain out of a legacy, in a question with the legatee's arresting creditors, though part of the expense was incurred, and the decree for expenses pronounced, after the arrestments had been used.⁵ But where a purchaser of a land estate had taken the disposition in name of a trustee, who granted a back-bond declaring the trust, and obliging himself to denude, and the trustee thereafter having advanced several sums of money to the purchaser, brought a declarator against the purchaser's creditors, concluding that he was not bound to denude until he should be satisfied of his debts, the Court assoilzied the creditors, on the ground, that as the creditors

¹ M'Kenzie, 20th Dec. 1828, 7 S. 223.

² *Ex parte A B*, 21st November, 1829, 8 S. 103.

³ See Campbell, 17th June, 1824, 3 S. 145; Fettes, 7th July, 1825, 4 S. 149; Hyslop, 15th June, 1830, 8 S. 919.

⁴ Heirs of Selby, 5th June, 1795, M. 13438.

⁵ Brodie, 27th June, 1837, 15 S. 1195.

had the possession derived to them from their debtor, and as they did not demand a title from the trustee, a declarator of trust was as effectual to them as a conveyance from the trustee.¹

Expenses of
litigation.
Questions
affecting
patrimonial
interests.

By an equitable principle or rule of law, where there is a fair and reasonable dispute regarding a trust, the expenses of both parties are held to be a just burden on the trust-estate. As, for instance, in litigations as to the validity of trust-deeds affecting patrimonial rights of succession, or as tending to remove difficulties in the construction of the deed. Thus, where the question was as to whether the 39th and 40th Geo. III. c. 98, commonly called the Thellusson act, applied to Scotland, and whether a deed revoked all prior deeds, it was held that the pursuer had a title to raise the action, and that therefore the whole expenses should be so paid.² And where actions were brought to reduce trust-deeds of conveyance for charitable purposes, on the ground of vagueness and uncertainty, although not successful, the costs of the parties challenging were ordered to be so paid.³ Again, the same rule was applied where an action of multiplepoinding was raised at the instance of trustees, to determine the effect of certain instructions by the trustee to his law agent, as to preparing a new deed of settlement, which was never completed.⁴ And where an objection to the constitution of the trust was held too critical to be sustained,

¹ Dalziel, 16th July, 1731, M. 9139.

² E. of Strathmore, 16th February 1830, 8 S. 530; Aff. 23d March, 1831, 5 W. S. 170.

³ Hill, 14th December 1824, 3 S. 389; Aff. 14th April, 1826, 2 W. S. 80; Crichton, 12th May, 1826, 4 S. 553; Aff. 25th July, 1828, 3 W. S. 329; Miller, 14th July, 1837, 2 S. M. 866.

⁴ Stainton, 17th January, 1828, 6 S. 363.

the rule was held to apply on the ground that the trustees had an interest to have the question tried, so as to ascertain the validity of their title.¹ And likewise, where a claim under a trust for charitable purposes was brought on similar grounds, which were held invalid, the expenses were so ordered to be paid, on the ground that the discussion of the question had cleared up a point in the administration of the trust.² Where there was a difficulty as to the period of vesting of certain provisions, and the trustees raised an action of multiplepoinding to try the point, the expenses of both parties were so ordered to be paid, on the ground that the discussion had been occasioned by the ambiguous terms of the trust-deed.³ And where the question was raised as to the effect of reversionary provisions in a marriage-contract containing a trust, regarding the power of disposal by the widow and heir of the marriage, the expenses were ordered so to be paid.⁴ So also where a declarator was raised to determine the mode of division and period of vesting under the deed, by certain of the parties interested, the pursuers and defenders appearing were held to be equally entitled to their expenses out of the first of the rents and profits.⁵ Upon a similar principle, where a question arose as to the powers of trustees to sell heritage under a deed conveying it to them in general terms, it being held that it was for the benefit of the trust that this question should be settled,

*Regarding
powers, &c.*

¹ Morrison, 30th June, 1829, 7 S. 810.

² Duguid, 8th February, 1839, 1 D. 473.

³ Grieve's Trustees, 9th June, 1830, 8 S. 896.

⁴ Craigie, 17th June 1837, 15 S. 1157.

⁵ Bryden, 17th February, 1831, 9 S. 457 ; Aff. 22d April, 1833, 6 W. S. 354. See also Rigg, 12th February, 1836, 14 S. 472 ; E. of Stair, 19th June, 1827, 2 W. S. 614 ; Templer, 1st April, 1828, 3 W. S. 47.

the expenses of all parties were allowed out of the trust-estate.¹ So likewise where a party, by trust-disposition and settlement, conveyed to trustees all his property, under burden of a certain annuity to his widow during her insanity, and a total liferent in the event of her recovery, in full of all her claims, and her mother having petitioned the Court for the appointment of a curator bonis, and a difference of opinion having arisen between the mother and the trustees as to the party to be appointed, and the Court appointed a party not recommended by either, the expenses of both parties were allowed to be paid out of the trust-estate.² So also where a married woman applied for aliment out of a fund conveyed by antenuptial marriage-contract to trustees, excluding the *jus mariti*, her husband having become bankrupt, and she having no other means of support, and the claim was sustained, the expenses of the application were ordered to be laid upon the fee of the trust-estate; it being observed, that every sum or subject is primarily and inherently burdened with the necessary expense of taking care of itself.³

Exceptions.

But although a general rule, this is by no means an invariable one. Thus, the expenses of an unsuccessful action of reduction of a trust-deed by an heir, on the ground of the deed not having been properly and legally executed, were refused to be allowed out of the trust-funds.⁴ So also where the question at issue was as to import of the term "heir entitled to succeed," he being excluded from any share under

¹ Robertson, 7th March, 1832, 10 S. 438.

² Stewart, 12th Feb. 1830, 8 S. 512.

³ Gibb, 8th June, 1839, 1 D. 889.

⁴ Yeats, 6th July, 1833, 11 S. 915

the trust-deed, the party trying the question, and who was held to be the party within the meaning of the testator, was not allowed to have the expenses of the action paid out of the trust-fund.¹ And where legacies were left for charitable purposes to certain unincorporated societies, and questions arose as to how they were entitled to appear and claim in a court of law, and as to what was to be held a sufficient designation of these societies, the expenses of the competition were refused to be allowed out of the trust-estate;² for it is not to be supposed that such a circumstance as funds or an estate being bequeathed to trustees for charitable purposes, will justify questions being raised as to the constitution of the trust, which in other circumstances would be barely if at all sufficient.³ So also where an action of multiplepoinding had been raised by a trustee, to have the meaning of a very obscure trust-deed determined as regarded the period of vesting of the beneficiary right, instead of following the ordinary course in such cases, of giving both parties their expenses out of the fund *in medio*, which, in the circumstances, would have been equivalent to making the successful party pay the expenses of both sides, the Court found neither party entitled to expenses.⁴ Where there is no question as to the right to the trust-property, or administration of the trust, although the pursuer shall have been successful, and the litigation shall have taken place against trustees who have paid their expenses out of the

¹ Clarke, 18th December, 1832, 11 S. 220, and 17th June, 1833, *Ibid.* 685.

² Sommervail, 22d January, 1830, 8 S. 370.

³ Per Lord Gifford, in Hill, 2 W. S. 92.

⁴ Kennedy, 20th July, 1841, 3 D. 1266.

trust-fund, though unsuccessful, that will not be sufficient to entitle the pursuer to get his expenses out of the trust-fund;¹ for the trustees are bound to defend all questions affecting the interests of the estate, and are entitled to be indemnified when doing so on reasonable grounds, though not successfully. But if a trustee shall knowingly be guilty of improper conduct, he will not be allowed his expenses out of the trust-fund. Thus, where an action of multiple-pounding was brought by persons interested in certain trust-funds, in name of one trustee, and the action was dismissed, on the ground that there were other accepting and surviving trustees who were not called, the expenses of the nominal raiser, the trustee, were refused, though his objections to the process had been sustained, in respect he had not, when required to do so, informed the real raisers who the other trustees were.²

General rule. All claims for expenses incurred in litigation must depend for their success, in a considerable degree, on the exercise by the Court of a sound and equitable discretion. Each case must therefore be affected by its own special circumstances. Where expense is unjustifiably occasioned by litigation, the Court is itself rendered an instrument of injustice, against which it is bound to protect itself and the leiges. As a general rule, a trustee is bound to defend the trust-estate, which, without fraud on his part, has been committed to him. He therefore obtains his expenses in accounting for the proceeds, without the necessity of demanding decree to that effect. On the other hand, the party challenging the constitu-

¹ Earl of Fife, 8th July, 1826, 4 S. 818.

² Lang, 7th March, 1839, 1 D. 658. See also *infra*, page 299.

tion of a trust can have no just claim for expenses out of the fund, unless he can shew, 1st, a clear title, 2^d, an undoubted interest, and 3^d, reasonable grounds for a hope of success in his action, and that the action shall have been conducted in a fair and correct manner.

3. A trustee, in fulfilling the purposes of the trust, has a right of relief against his constituents, that is, against the trustor¹ and beneficiaries in private trusts, and acceding creditors in trusts for creditors. But although the trustee has thus a preference for the payment of the expenses incurred by him in conducting the trust-affairs, still the persons employed by the trustee have no lien upon the trust-fund, but only a remedy against the trustees on the ground of the contract.² Where there is a reversion, the trustee may pay himself, or retain the property, whether heritable or moveable, till indemnity be afforded him. Where there is no reversion, the indemnity will fall upon the acceding creditors, who, by claiming under the trust, sanction the proceedings of the trustee, and thereby become liable *ex mandato*. Thus, also, creditors having a preferable security over the trustor's heritable property, do not necessarily come under the trust; but if the heritage shall prove insufficient to liquidate the debt, and they shall then claim for the balance due them as common creditors under the trust, they cannot claim a share of these funds without admitting the trustee's right to deduct the expense incurred in realizing them.³ And where a trustee had been allowed to remain in undisturbed possession for four years on a legal title,

Liability of constituents,
viz. of trustor,
beneficiaries,
or acceding creditors.

¹ See English Case of *Balsh v. Hyham*, 2 P. W. 453.

² See *inf. part 4.* ³ *Fraser*, 21st November, 1829, 8 S. 104.

and had *bona fide*, and beneficially for the estate, expended money, it was held he was entitled to be reimbursed out of it, and that the heritable creditors were barred from resisting the claim.¹ But in order to render creditors liable for extraordinary expenses, it is necessary, particularly in the case of a trust under a *cessio*, that the proceedings in which the expenses are incurred, shall have been specially authorized by the creditors.²

Trust-expenses, how allocated.

The ordinary expenses of trusts are paid out of the ordinary income of the trust-estates. Extraordinary expenses are deducted out of the capital of the estates. In determining what should be considered as the interest, dividends, rents, or produce of the estate primarily appropriated to the payment of annuities, it was held that the whole expenses incurred in realizing the estate, or in changing the securities thereof, must be deducted from the gross capital; that the ordinary annual expenses of management of the trust-estate, including the ordinary expenses of management of the heritable property, was to be deducted from the annual-rents and profits; but that all extraordinary expenses brought upon the trust-estate in the course of management, such as the expenses of process for the division of commony, or augmentation of minister's stipends, were to be deducted from the capital stock of the estate.³ Where certain lands were conveyed to trustees to divide and pay annually the free rents, deducting all necessary charges con-

¹ Russell, 1st March, 1823, 2 S. 257.

² Bell, 19th Nov. 1842, 5 D. 162; Sprot, 29th Jan. 1836, 14 S. 382; and *sup.* part 2, c. 6.

³ Pearson, 6th June, 1840, 2 D. 1020.

nected with, or burdens on the said lands, either by law or in terms of the current leases, and deducting a certain annuity payable from the lands, equally and proportionally among certain parties, and the survivors or survivor of them,— it was held, that the expense of making up titles to the property, and in particular, of entries with the superior or superiors, in so far as such entries are necessary from the nature of the title, must be considered as necessarily connected with the lands, or a burden thereon by law, and as such must be paid out of the said funds or rents, before it could be held that they were free rents.¹ So, also, the expenses of management, or loss incurred in the course of trust-management, fall upon the residue, and not upon the special legatees. Thus, where the residue of a trust-estate conveyed by trust-deed, was declared to be payable to A, on the occurrence of a certain event, the deed likewise specially providing a sum of money to be invested on heritable security in the persons of the trustees, to A in liferent, and her children in fee— and the necessary expenses of management were to be paid out of the trust-funds— and A assigned to B her claim to the residue of the estate— and thereafter the event in question happened— and certain expenses were subsequently incurred, necessary for the keeping up of the trust, and the management of the special provision,— it was held, that these expenses fell to be deducted from the residue payable to B, and a sum was allowed to be reserved by the trustee to meet the future expenses of management.² So, also, where a trust-deed provided that certain special

¹ Morrison, 14th Feb. 1837, 15 S. 560.

² Laird's Assignees, 24th November, 1836, 15 S. 120.

legacies should be set apart, after which the residue of the estate was to be divided into four portions, to be also set apart for particular legatees,— it was held, that any loss which might arise upon the trust-estate by the mode of investment adopted by the trustees prior to all the shares being separately invested, must be charged upon the portions of the residuary legatees.¹ But where a testator, who died abroad, left certain special legacies, which were administered by his executors, along with the rest of his estate as a cumulo fund during a considerable period, which was requisite for extricating the settlement, and realizing the estate — and the special legatees claimed and obtained a share of accumulations of interest, and profits accruing on the cumulo fund proportioned to the amount of their legacies as compared with the rest of the cumulo fund, — it was held, that it was to be treated as a question, not between legatees and a residuary fund, but between two parties interested in a cumulo fund in certain proportions ; and that the legatees, having taken benefit to a large amount by that construction of the respective interests of the parties, were not entitled to reject it, in regard to the expense incurred in that cumulo administration ; and that therefore the expense ought to be borne by the parties proportionally to their respective interests.²

*Effect of delay
as to sale.*

Where property was conveyed to trustees, with discretionary powers as to the times of sale, for payment of legacies, which were declared not to be payable till after such sale — and the trustees allowed several years to elapse without selling, — it

¹ Gray's Trustees, 4th June, 1885, 13 S. 866.

² M'Alister's Trustees, 30th November, 1886, 15 S. 170.

was held, in a question between the special legatees and the residuary legatee, that interest should run on the legacies of the former from the first term after the lapse of three years from the testator's death, which was allowed as a reasonable period within which to have sold the lands.¹

SECTION II.—LIABILITIES WHERE THE ACTS HAVE NOT BEEN CONSISTENT WITH THE TERMS OF THE TRUST.

1. In administering the trust-affairs, trustees are liable, at common law, for *culpa lata* only,² that is, for gross negligence of their duty, and not for trifling acts of inadvertence merely; for they are not liable for errors of judgment, but only for failure or refusal to do their duty, and for exceeding their powers.³ The question then comes to be, what is to be held as equivalent to *culpa lata*? Under acts the neglect of which is held to amount to *culpa lata*, are included all specified or necessary and implied duties, which they refuse or neglect to perform. Thus, if trustees shall be directed to invest money in a particular manner, and shall fail to do so, they will be liable for the loss both of principal and interest, incurred by the estate,⁴ for this is not a mere error of judgment, but a neglect or refusal to obey instructions. Thus also, where a trustee is appointed for the purpose of doing diligence, he is liable for exact

Liability where trustees, violating their instructions, fall short of their duties.

As to investment of funds.

¹ Ogilvie's Legatees, 10th Dec. 1833, 12 S. 189.

² Thomson, 16th Feb. 1838, 16 S. 560.

³ Opinions of Judges in Morrison, 9th Feb. 1827, 5 S. 322; see also Jeffrey, 5th July, 1821, 1 S. 102; Aff. 11th June, 1824, 2 S. Ap. 349.

⁴ Wellwood, 23d June, 1831, 9 S. 790.

diligence, that is, for the whole debts assigned.¹ So also, where trustees under a settlement, which directed the free residue to be invested in heritable property, or in bank security, refused, when desired by the parties interested, to invest in government stock a part of the funds which had been realized, and which was lying in a private bank, were found liable to the extent of the loss sustained, by the value of the stock having afterwards risen.² And again, where trustees neglected to invest a sum of money in terms of the trust-deed, but allowed it to be uplifted by the husband of the party for whose behoof and that of his children the trust was created, they were held liable for the sum.³ They are also liable, if investments be made ineffectually, as well as bound to make them in terms of the trust-deed.⁴ Where a trust-deed directs funds to be invested in a particular manner, and the trustees, instead of doing so, or ascertaining that it is done, allow the funds to remain in the hands of the factor, they will be liable, for they allow them to remain in the factor's possession, contrary to the express directions of the trust.⁵ Thus also, where the trustees were

¹ Wemyss, 10th June, 1674, M. 3538 ; Stark, 26th June, 1714, M. 3540.

² Morrison, 9th Feb. 1827, 5 S. 322. In England, if trustees be directed to invest the trust-property in government or real securities, they will be answerable for the amount of stock which might have been purchased at the period when the conversion should have been made ; Hockley v. Banstock, 1 Russ. 141 ; Dimes v. Scott, 4 Russ. 195 ; Byrshall v. Bradford, 6 Mad. 18 S. C. Id. 235 ; Pride v. Fooks, 2 Beav. 430.

³ Anderson, 12th Feb. 1833, 11 S. 382. It would appear, that in England, if a testator shall direct an accumulation to be made, and the trustee shall disregard that direction, he will be liable for compound interest ; Raphael v. Boehm, 11 Ves. 107, per Lord Eldon, S. C. 13 Ves. 411, per Lord Erskine ; Dornford v. Dornford, 12 Ves. 127 ; Brown v. Sansome, 1 McClel. and Younge, 427 ; but see Tebbs v. Carpenter, 1 Mad. 290 ; and see L. on T. 291.

⁴ Mayne, 4th June, 1835, 13 S. 870 ; Graham, 4th March, 1831, 9 S. 543 ; Donaldson, 18th June, 133, 11 S. 740. ⁵ Sym, 13th May, 1830, 8 S. 741.

directed to see certain annuities secured, or to retain a sum in their hands to answer them, and one of the accepting trustees interfered, to the effect of authorizing the sum required to remain in the hands of the co-trustee on a personal bond without security, it was held, that there was not merely a neglect, but a transgression of the trustor's order, and that therefore the trustee was liable.¹ The same rule applies to all cases in which trustees allow funds to remain in the hands of factors; for they have been held to be bound to superintend the disposal of all funds, after they authorize their being uplifted.²

On the principle of trustees not fulfilling by an equivalent, they will be liable, if they do not retain full funds for payment of testamentary annuities, for they are not entitled to make an annuity depend merely upon any security which they may obtain for payment of it, unless the annuitant

Payment of
annuities.

¹ Moffat, 31st Jan. 1834, 12 S. 369.

² See part 3, c. 8, s. 3. It has been held, in England, that where a tenant for life (liferenter) has been wrongly in possession of the dividends of a stock, which ought to have been converted, he will be accountable to the remainder-man (fiar) for the excess of his receipts, beyond the income he would have received had the fund been properly invested; Howe v. Earl of Dartmouth, 7 Ves. 137, *et seq.*; Mills v. Mills, 7 Sim. 501; and see Pickering v. Pickering, 4 M. and Cr. 289. The question, whether, if the tenant for life should be insolvent, the trustee would be obliged to make compensation, seems undecided; see Howe, *ut sup.*; and Hollands v. Hughes, 16 Ves. 111. But where they were expressly directed to convert the trustor's personal estate into money, and invest in government real securities, in trust for A for life, remainder to B, and they for eleven years permitted A to receive ten per cent interest upon an Indian loan, it was held, that they were liable for the difference between the ten per cent interest they had wrongfully paid, and the interest that would have resulted from a conversion into three per cent consols, at the expiration of one year from the trustor's decease; Dimes v. Scott, 4 Russ. 195; and see Mehrtens v. Andrews, 3 Beav. 72. In such cases in Scotland, the trustees would in general be held primarily liable, as having fallen short of their duty.

Special obligation to pay. shall consent.¹ Where trustees undertake to pay a debt at a certain fixed time, if they shall then have funds, they are bound to pay, if by proper management they might have had funds at that time.²

Non-exercise of a power. Trustees are not liable for the non-exercise of a power. Thus, where a party granted a bond of security for behoof of another, binding and obliging himself, his heirs, executors, and representatives whomsoever, to provide and secure the said annuity on good heritable or personal security, at sight of certain parties whom he appointed his trustees, with power to them to ask and demand from the trustee good and effectual security for the annuity, so that it might remain and be secure to the annuitant for life, and binding them to apply the proceeds for behoof of the party named—security not having been obtained, and the trustee having become insolvent, it was held that the trustees were only empowered, and not bound to obtain security, and that therefore they were not liable for the loss incurred.³

Necessary and implied duties. The same strictness applies to the necessary and implied duties of the office. Thus, if the trustee shall neglect to clear off burdens upon the trust-estate, which should be cleared off, after he has come into possession of the means of doing so, he will be liable to the beneficiary for the interest of that sum during the period in which it has been so allowed to remain unpaid.⁴ Or if the estate shall partly

¹ Wilson, 31st Jan. 1833, 11 S. 343.

² Aitken, 10th Feb. 1829, 7 S. 390.

³ Stark, 7th June, 1838, 16 S. 1114. See S. C. 23d June, 1840, 2 D. 1199.

⁴ Thus, in England, if the outstanding debts carry interest at five per cent, the executor will be charged with interest at the same rate; Dornford *v.* Dornford, as cited in Tebbs and Carpenter, 1 Mad. 301; Hall *v.* Hallet, 1 Cox, 134; Turner *v.* Turner, 1 J. and W. 39.

consist of a policy of insurance, and the trustee shall allow it to become forfeited, by neglecting to pay the premiums, he will be liable for the consequent damage.¹ Thus, also, if a trustee neglect to do diligence, and the debtor becomes insolvent, he will be personally liable.² But where a trustee was bound to denude whenever the trustor pleased, he was held not to be liable to do diligence, but only for his actual intromissions.³ If trustees neglect to keep accounts, and any question arise as to the actual sum realized, they will be liable for the whole sum due to the estate.⁴ It being the duty of trustees to exhibit the trust-deed to all having interest, they will be liable in expenses of process, if such shall be necessary, in order to obtain exhibition.⁵ And as trustees are bound to give such information to beneficiaries under the trust, as legatees, &c., as shall prove to them that their interest is properly attended to, if this be refused, on bringing an action regarding their claims, the trustee will be held liable in full expenses.⁶ They will also, if they do not obey the instructions of the deed, be liable for the loss of interest, if they do not add the interest of the trust-funds to the principal at least annually.⁷ If trustees lend money belonging to the trust-estate on bonds payable to themselves *privatis nominibus*, they are not entitled to charge against the estate any loss which may arise on them.⁸ If

¹ See Eng. Ca. of Marriot v. Kinnersley, Taml. 470.

² Marshall, 6th February, 1677, 1 B. Sup. 790; Sinclair, 9th November, 1744, Elch. Trust, 12, M. 3524.

³ Cass, 18th December, 1666, M. 3536.

⁴ Gourlie, 28th November, 1710, M. 16192.

⁵ Nicol, 19th June, 1829, 7 S. 777; Provan, 25th May, 1830, 8 S. 797.

⁶ Murray, 24th May, 1831, 9 S. 631.

⁷ Campbell, 9th July, 1840, 2 D. 1367.

⁸ Murray, 5th December, 1797, M. 3237.

they put the money in a bank, or under any other safe security, within a reasonable time, in name of the trust-estate, they will only be liable *qua* trustees; but if they invest it in their own name, then they are personally liable; for, on the one hand, they do more than they were called on to do, and must therefore suffer the loss; and, on the other hand, on the principle of trustees being bound to communicate eases, they are not entitled to invest it in such a manner as that ameliorations may possibly accrue to them therefrom; and, above all, as the estate is thereby subjected unnecessarily to the risk of their insolvency.¹ And where a trustee or factor takes a bond in his own name, the *jus exigendi* descends to his representatives, but for behoof of his constituents; and any defence good against the constituents will be good against the representatives.²

*Termination
of trust.*

When trustees have brought the affairs of a trust to a termination, they will still be liable, if they do not see the funds properly deposited in a bank. Thus, trustees having brought a process of multiplepoinding and exoneration as to the balance in their hands, which they allowed, after the process was brought, to remain in the hands of one of their number, who subsequently became bankrupt, it was held, that those trustees who had actually intromitted were not entitled, in the circumstances, to the expenses of obtaining their exonera-

¹ See Jeffrey, 15th May, 1835, 1 S. M. 767. In England, a trustee who lodges trust-funds with his banker in his own name, is held to employ it in trade, and consequently to be liable for interest at five per cent; Treves v. Townshend, 1 B. C. C. 384; Moona v. De Bernales, 1 Russ. 301; in re Hilliard, 1 Ves. jun. 90; Sutton v. Sharp, 1 Russ. 146; Rocke v. Hart, 11 Ves. 61; but see Browne v. Southouse, 3 B. C. 107, and see L. on T. 291.

² Crawfurd, 30th November, 1739, Elch. Trust, 8.

tion.¹ If trustees denude of the estate in favour of the beneficiary before they shall have accomplished the purposes of the trust, as paying debts, &c., or by making full provision for their extinction, they will, along with the beneficiary, be liable for the claims still remaining unliquidated.² And a discharge to trustees is inconclusive, where it is admitted that questions remain unsettled: as, where the managing trustee, under a deed of settlement, at receiving a discharge of an action of compt and reckoning, granted a letter to the pursuers, declaring that certain claims against his brother, another of the trustees, were not settled, and should be determined by a submission, it was held that both these parties were accountable under that letter.³

¹ McNair, 24th June, 1830, 8 S. 968.

² Fraser, 8th December, 1826, 5 S. 104.

³ Graham, 15th June, 1827, 5 S. 806. In England, it has been held, that after payment of debts and legacies, if the trustee be guilty of laches in accounting for the surplus estate to the residuary, (*Forbes v. Ross*, 2 Cox, 113; *Seers v. Hind*, 1 Ves. jun. 294; *Younge v. Combe*, 4 Ves. 101; *Longmore v. Broom*, 7 Ves. 124; *Roke v. Hart*, 11 Ves. 58; *Piety v. Stace*, 4 Ves. 620; *Ashburnham v. Thomson*, 13 Ves. 402; *Raphael v. Boehm*, 11 Ves. 92; S.C. reheard, 13 Ves. 407, and 590; *Dornford v. Dornford*, 12 Ves. 127; *Franklin v. Frith*, 3 B. C. C. 433; *Littlehales v. Gascoyne*, 3 B. C. C. 73; *Newton v. Bennet*, 1 B. C. C. 359; *Lincoln v. Allen*, 4 B. P. C. 553; *Crackelt v. Bethune*, 1 J. and W. 586; *Tebbe v. Carpenter*, 1 Mad. 290,) or next of kin, (*Hall v. Hallet*, 1 Cox, 134; *Perkins v. Baynton*, 1 B. C. C. 375; *Stackpool v. Stackpool*, 4 Dow. 209, 224; *Heathcote v. Hulme*, 1 J. and W. 122,) he will be charged with interest for the balance improperly retained in his hands. And where he has failed properly to apply the trust-funds, it will not be a sufficient excuse, that he made no actual use of the money, but lodged it at his banker's, (*Younge v. Combe*, 4 Ves. 101; *Franklin v. Frith*, 3 B. C. C. 433; *Treves v. Townshend*, 1 B. C. C. 384; in re *Hilliard*, 1 Ves. jun. 89; *Dawson v. Massey*, 1 B. and B. 230; *Brown v. Southouse*, 3 B. C. C. 107, and see *Rocke v. Hart*, 11 Ves. 60,) and by a separate account; *Ashburnham*, *ut sup.* The rate of interest which is usually charged in such cases is four per cent. See *Forbes v. Ross*, 2 Cox, 116; *Hall v. Hallet*, 1 Cox, 138; *Tebbe*, *ut sup.*; in re *Hilliard*, *ut sup.*; *Brown*, *ut sup.*; *Mosley v. Ward*, 11 Ves. 582; *Perkins*, *ut sup.*; *Treves*, *ut sup.*; *Hicks v. Hicks*, 3 Atk. 274; *Young*, *ut sup.*; *Rocke*, *ut sup.*; *Hankey v. Garret*, 1 Ves. jun. 236. But see *Bird v. Lockey*, 2 Vern. 744; but only

The cases now mentioned comprise but a limited number of instances of liability for failure to perform the duties of trusts, as, indeed, it would be impracticable to attempt to enumerate the special circumstances in which they arise, the only guide being the simple rule of law, that, where there is a duty to be performed, there is a liability for its execution.

Liability where trustees violate their instructions, and exceed their powers, or otherwise do rash and improper, incompetent or illegal acts.

Act of investiture in trusts for creditors.

2. The liability as regards the trust-estate being measured by the powers conferred, the trustees are therefore liable for all acts not authorized by these powers. As already stated,¹ it is necessary that a party, before accepting of a trust, should pay strict attention to its nature, peculiarities, and liabilities ; but after acceptance, also, it is necessary that strict attention should be paid to the act of investiture, as the most serious importance attends the nature and extent of the obligations and liabilities in which it may involve the trustee and the trust-estate ; for by taking possession of the heritable estate of the trustor, involving onerous obligations to third parties, liability for these obligations is thereby incurred. Although a trustee is in one sense the representative of his constituent, as being assigned into his rights, yet, the assignment being made and accepted for a special purpose,—that of distribution among creditors,—the trustee, in fact, becomes substantially the representative of these creditors, and is only bound for the bankrupt's acts to the same extent that the creditors are bound ; that is to say, the trustee cannot avail himself of any contract made

where it does not appear that none has been made ; per Lord Thurlow in *cases of Forbes, Hilliard, Hankey, Hall, &c. sup.*, and *Brown v. Litton*, 10 Mod. 21, per Lord Hancourt.

¹ *Swprā*, page 105.

by the bankrupt, without fulfilling the counterpart or obligation incurred by the bankrupt; but the trustee, as a third party, may reject the contract, reserving to the party interested to rank on the trust-estate for any loss that the party may sustain by the breach of engagement resulting from the inability of the bankrupt to fulfil his obligations. The general doctrine amounts practically to this, that where a bankrupt has an interest in any prospective contract, the creditors may be called upon either to undertake his part, or to abandon the contract, leaving his estate exposed to the claim of damages. Thus, liability may be incurred for feudal obligations, which are often of the most serious kind; as, where a party had acquired a right to certain heritable subjects, which he held under separate feudal titles, conveyed the whole property, by one disposition for behoof of creditors, to a trustee, who rashly took infestment, drew the rents, and exercised other acts of possession; in which case it was held, that the trustee had adopted the feu, and was personally bound, in a question with the superior, to implement the obligations contained in the feu-charter.¹ If, therefore, in the case now mentioned, the trustee had merely accepted of a general disposition from the trustor, he might have been called on either to undertake the burdens and obligations in the feu-charters, or to abandon the subjects of them. But it is the act of taking infestment which here binds the party adopting the charters to implement the obligations contained in them; for where a trustee on a sequestrated estate, during a discussion

¹ Abercorn, 16th December, 1835, 14 S. 168.

as to the validity of an heritable security over a feu, in which the bankrupt had been infest, entered into possession, drew the rents, and paid the feu-duties, but did not take infestment, and, on the security being found effectual, abandoned it, he was held entitled to do so, and not to be liable to the superior for the feu-duty and other prestations of the feu-contract in time to come.¹ When the trustee takes infestment in property involving burdens, although primarily liable, he will, however, have a right of relief against the trust-property, of whatever kind, or, in the event of there being no funds, then all the acceding creditors will also be liable in relief.

Adoption of leases.

Serious liability may also be incurred by the assumption of leases held by the trustor; for, by adopting the lease, the trustee is liable to the landlord for all arrears of rent.² Accordingly, where a tacksman of lands assigned his lease to certain persons, as trustees for his creditors, who entered into possession, it was held that, by accepting the assignation, they had subjected themselves to payment of two years of rent then due, as being a burden inseparable from the lease.³ So also where the estate of a tenant is sequestrated, and the trustee takes the benefit of the lease, by entering to possession, the landlord is a preferable creditor for repairs preivable by the tenant.⁴ And in like manner, where a trustee on a sequestrated estate had entered into possession of a coal-field, and been infest in feu-rights belonging to the bankrupt, and had for many years taken the

¹ Mitchell's Trustees, 23d January, 1834, 12 S. 322.

² Nisbet's and Co's Trustees, 10th December, 1802, M. 15268.

³ Ross, 5th February, 1786, M. 15290.

⁴ Cuthill, 21st November, 1818, F.

benefit of the lease and feu-rights for the use of the sequestrated estate, it was held that he and the trustees who succeeded him were bound to fulfil the prestations to the landlord, and not entitled to abandon the contracts.¹ Trustees for creditors taking possession of farms are also liable for the rents during their possession;² but they are entitled to credit for the value of effects sequestrated by the landlord.³ They ought to beware of preventing the proprietor from resuming possession of his property, where he has a right to do so. Thus, where, although a trustee on a bankrupt estate was held not liable for the rent, or arrears of rent, of a distillery of which the bankrupt had a lease, it having been a condition of the lease that, in the event of the tenant's bankruptcy, the lease should be voided, and possession ceded to the landlord, and the trustee opposed the landlord's resumption of possession, it was held, in an action at the landlord's instance, that the extra-judicial and judicial opposition as averred, were relevant to sustain a claim for damages.⁴ This rule as to adoption by trustees, namely, that they are not bound to adopt the whole transactions of a bankrupt, but that, where they do adopt them, they are bound to fulfil his obligations, applies also to arrangements entered into, or in progress of being entered into, by the trustee, regarding the administration of his property, as, for instance, in the case of an agreement between a landlord and tenant, that the latter shall renounce his lease at a

¹ Kirkland, 17th May, 1831, F. 9 S. 596.

² Fairlie, 18th December, 1821, 1 S. 222.

³ S. C. 12th February, 1823, 2 S. 214.

⁴ Richardson, 24th June, 1835, 13 S. 972.

particular period, in consideration of a certain sum, and the landlord, prior to that period, becoming bankrupt, and conveying his estate to trustees, if the trustees do not in any way adopt that agreement, the tenant must either retain his lease, or rank as an ordinary creditor under the trust for the stipulated price.¹

Trusts for
family pur-
poses.

In the case of trusts for family purposes, there is no risk in the trustee's taking investiture in terms of the trust-deed, as the directions of the trust must be complied with. But where there is apparently any risk of insolvency, the trustee ought to be very cautious how he undertakes any liabilities, or even allows those to continue which already exist. In regard to copartnery, trade, and manufactures, general rules have been already stated, in treating of the duties of trustees,² and in the absence of decisions on questions regarding the duties and liabilities of trustees in such cases, it can only be said, that, unless very special authority be given by the trust-deed, trading is so little an implied duty of trustees, that they will be guilty of mal-administration of the estate, and therefore incur serious liability, where they rashly engage in such; so that, looking to these liabilities, they ought on no account to engage in trade, unless the directions contained in the deed amount to the declaration of a positive duty on their part.³

¹ Ferrier, 24th May, 1822, 1 S. App. 159.

² See *sup.* page 239, *et seq.*

³ It has been held in England, that where money has been employed in trade, the cestuique trust has the option of taking the actual profits, or of charging the executor with interest at five per cent; Treves v. Townshend, 1 B. C. C. 384; Rocke v. Hart, 21 Ves. 61, per Sir W. Grant; Heathcote v. Hulme, 1 J. and W. 122, 134; Attorney-General v. Solly, 2 Sim. 518; Walker v. Woodward, 1 Russ. 107; and see Anon. Case, 2 Ves. 630, per Sir J. Clarke; Docker v. Somes, 2 M. and K. 655; Palmer v. Mitchell, cited ib.

Trustees are also liable for acting rashly in conducting the administration of the trust-affairs. Such liability may be incurred by the trustee calling in funds properly invested before they are immediately required for the purposes of the trust,¹ or by litigating improperly; for although trustees are, in the general case, entitled to be protected from all loss in the discharge of their duty, and consequently any litigation fairly arising out of the peculiarities of the trust, or of the situation of the claimants on it, must generally fall on the fund of division; yet there may be exceptions from the rule, as trustees may, from over-scrupulousness or obstinacy, engage in litigation, occasioning great and unnecessary expense, which it would be unjust to impose on those holding the beneficial interest in the trust.²

They are also personally liable for all loss suffered by the illegal application of funds, as applying them to the payment of debts due to themselves, in preference to other claims;³ or by endeavouring by compensation to evade the liabilities of the office

672, *ex parte Watson*, 2 V. and B. 414; *Brown v. Sansome*, 1 M'Cl. and Y. 427.

¹ *Watson*, 9th June, 1843, 5 D. 1182. It has been held in England, that, if trust-funds be outstanding on proper security, and the trustee call them in for no purpose connected with the trust, and, therefore, in dereliction of his duty, he may be compelled, at the option of the cestuique trust, either to replace the specific stock, or to account for the proceeds of the sale, (*Bostock v. Blackeney*, 2 B. C. C. 653; *ex parte Shakehaft*, 3 B. C. C. 197; *O'Brien v. O'Brien*, 1 Moll. 533, per Sir A. Hart; *Raphael v. Boehm*, 11 Ves. 108, per Lord Eldon; *Harrison v. Harrison*, 2 Atk. 121; *Bate v. Scales*, 12 Ves. 402,) with interest at five per cent; *Crackelt v. Bethune*, 1 J. and W. 586; *Mosley v. Ward*, 11 Ves. 581; *Pocock v. Reddington*, 5 Ves. 794; *Piety v. Stace*, 4 Ves. 620.

² Per Lord Fullerton, in *Smith and Co.* 29th June, 1838, 16 S. 1223; *Smith*, 25th January, 1822, 1 S. 271; *Paul*, 23d November, 1832, 11 S. 81; *Raeburn*, 12th June, 1831, 9 S. 728. See *spp.* page 282.

³ *Osburn*, 8th December, 1714, M. 16195.

to the trustee or beneficiaries;¹ or in the case of trustees for creditors, by paying certain creditors prematurely.² Trustees were held personally liable where they intromitted with the rents and profits of an estate, notwithstanding intimation that an action of reduction of the trust-deed was to be brought.³ So also, where parties had obtained a disposition to themselves in trust for the establishment of a charity, and it was thereafter declared by verdict of a jury, in an action at the instance of the granter, that the disposition was not his deed, and reduced accordingly, the trustees were held personally liable in expenses, and not allowed to charge them against the trust-funds.⁴ They will also be liable where they relinquish any security without the authority of the constituents, as by letting a debtor out of prison,⁵ or giving a general discharge to a debtor before he has paid the whole debt;⁶ as also in the case of payments made by trustees to parties not entitled to receive them, which do not support an exoneration.⁷

Exceeding powers.

Where trustees exceed their powers by doing, without special authority, acts which require such, as borrowing money,⁸ they are personally liable. Where powers are given for a special purpose, and the trustees exceed their powers, or violate these

¹ Craig, 6th December, 1677, M. 16174.

² Bell, 17th June, 1834, 12 S. 738.

³ Clyne, 14th December, 1839, 2 D. 243. See Ersk. Inst. b. 2, t. 1, a. 29.

⁴ Chalmers' Trustees, 23d June, 1830, 8 S. 961.

⁵ Abercromby, 31st January, 1723-4, Robertson's Ap. 457.

⁶ Dundas, 22d July, 1673, 1 B. Sup. 692.

⁷ Donaldson and Others, 18th June, 1833, 11 S. 740.

⁸ Thomson, 24th June, 1829, 7 S. 787; Sprot, 29th January, 1836, 14 S. 382.

instructions, they are personally liable for the whole loss, where such ultimately arises, and also for interest, credit being allowed for payments to the beneficiary, or burdens from which he has been relieved by the acts of the trustee.¹ Their being in the most perfect *bona fides* will not avail them, if it shall be determined that they have acted inconsistently with their powers; for this is not an error of judgment merely, but a misinterpretation of their powers in a matter as to which they had no discretion; for the very prevalent supposition that *bona fides* will excuse an assumption of power not legally conferred upon a party, is a mere error in law. Accordingly, where trustees, or judges in inferior courts, assume powers not conferred upon them, or perform acts beyond their legal powers, these acts are uniformly held to be null and void.

But still much difficulty has been found to attend this subject, in determining as to whether special cases do not form exceptions. In the case of Pollexfen, already alluded to,² it having been determined that the trustees, in purchasing feu and teind-duties due to the superior, where the trust was for

¹ Pollexfen, 14th July, 1841, 3 D. 1215; S. C. 9th December, 1841, 4 D. 224; see also *Pride v. Fooks*, 2 Beav. 490. It has been held in England, that if trustees be authorized to invest in stock or real security, and they lend on personal security, and the money is lost, they shall be answerable, not for the amount of the stock which might have been purchased, but for the principal sum lost; as, if real security had been taken, the principal only would have been forthcoming to the trust, and therefore the want of security is all that can be imputed to the trustee; *Marah v. Hunter*, 6 Mad. 295. But where a trustee is guilty not merely of negligence, but of actual corruption or misfeasance, he is in England held liable in interest at five per cent; *Tebbs v. Carpenter*, 1 Mad. 306, per Sir J. Plumer; *Bick v. Motley*, 2 M. and K. 312; and see *Cracket v. Bethune*, J. and W. 588; *Docker v. Somee*, 2 M. and K.; but see *Meader v. M'Cready*, 1 Moll. 119.

² 14th July, 1841, 3 D. 1215; *sup. page* 214.

the purchase of lands, had exceeded their powers, they were held liable, although they appeared to have acted with the most perfect *bona fides*. But previous to this, it was decided, in the case of Sharpe,¹ that where a trust was for the purchase of lands, it was competent to purchase superiorities, such an acquisition being thought beneficial to the estate; and, in the case of Sprot's Trustees,² where the purpose of the trust was to buy an estate and entail it, and an estate having been bought without a mansion-house, it was held that the trustees were entitled to build one. And in the case of Kay v. Miln,³ where one of three trustees under a trust which made two a quorum, and gave power to name a factor, — it was held, that the trustee who acted as factor, had power to bind his co-trustees to let a shop rent-free to the husband of the party whose property they held in trust, although the purpose of the trust was to save it from the *jus mariti*. These decisions, however, seem hardly reconcileable with each other; for notwithstanding the rule already stated,⁴ that trusts are to be liberally interpreted where the purpose of the trust is evident, still the rule that where special purposes are stated, these are to be strictly enforced,⁵ is precisely applicable in the present instances. These last-mentioned cases cannot, therefore, be looked upon as of authority. The doubtful, if not erroneous nature of the decision in the case of Sharpe, is indicated in the opinions of one of the Judges in the recent case of the Trustees

¹ 11th Feb. 1823, 2 S. 303.

² 4th February, 1830, 8 S. 437.

³ See *sup.* pages 148, 156.

⁴ 11th March, 1830, 8 S. 712.

⁵ See *sup.* pages 148, 149.

of Cauvin's Hospital,¹ decided in accordance with the case of Pollexfen.

Such a case as that of a direction to purchase, is held, in England, as a general rule, to be of the strictest kind. Thus, it has been held, that if money be given to be laid out in a purchase of lands, the trustee will not be justified in expending part upon a purchase, and the residue in repairs and improvements.² It would have been a totally different case if the trustees had so disposed of funds arising during the course of the management of the estate, as in building a mansion-house, farm-steadings, or erecting fences and making repairs, as in the case of a minor beneficiary; for in such a case the general terms of the bequest and purposes may justify a considerable amount of latitude and discretion, although that, too, must be restrained within moderate bounds. The general principles of liability in cases of breach of trust, as established in England, are, that it is immaterial whether the trustee was a gainer or loser thereby;³ or whether the loss to the trust-estate would have occurred had no such breach been committed;⁴ and these, being the proper principles applicable to such cases, must apply also to the law of Scotland. But no trustee can be held liable for mere imaginary value.⁵

Rules of Eng-
lish law.

¹ 29th Jan. 1842, 4 D. 556, per Lord Mackenzie.

² *Bostock v. Blakeney*, 2 B. C. C. 653.

³ See *Dornford v. Dornford*, 12 Ves. 129; *Raphael v. Boehm*, 13 Ves. 411, S. C. Ib. 490, 491; *Moons v. De Bernales*, 1 Russ. 305; *Adair v. Shaw*, 1 Sch. and Lef. 272; *Lord Montford v. Lord Cadogan*, 17 Ves. 489; *Scurfield v. Howes*, 3 B. C. C. 90; but see *Attorney-General v. Greenhouse*, 1 Bl. N. R. 57, 59.

⁴ See *Caffrey v. Darbey*, 6 Ves. 496; *Cocker v. Quayle*, 1 R. and M. 535; *Clough v. Bond*, 3 M. and Cr. 496, per Lord Cottenham.

⁵ *Palmer v. Jones*, 1 Vern. 144.

SECTION III. — LIMITATION OF LIABILITIES.

Limitation of
liability.
Under the
principle of
bona fides.

1. There is a doctrine in the law of Scotland of the greatest importance in regard to liability, namely, the doctrine of *bona fides*, a doctrine borrowed from the Roman law, by which persons, although holding in their possession, and disposing of the proceeds of property not belonging to them, or over which they have no right of administration, are free from liability. The conditions of this rule are,— 1st, That there shall be a title; 2d, That there shall be the belief that the title is valid. This rule does not apply to cases where a party mistakes his powers, or the liabilities of the estate, and acts inconsistently with them.¹ It applies simply to the case of a party who, believing that he has a good title, *bona fide* disposes of the proceeds for behoof of the estate, or in accordance with the purposes of the trust.² Thus, where a sailor, in the prime of life, suddenly disappeared at a sea-port town, about four months prior to his father's death, and, twelve months afterwards, his father's trustees, acting under a deed of settlement, by which, in the event of the son's survivance, he had right to a share of his father's funds, paid a debt due by the son, it was held that they were entitled to take credit for that payment in accounting with the father's residuary trustees, though there was no evi-

¹ Hepburn, 15th December, 1830, 9 S. 188.

² Roxburgh, 13th June, 1822, F.; Watt, 25th June, 1821, 1 S. Ap. 48; Spruel, 5th Jan. 1743, Elch. *Bona et Mala Fides*, 5; Erak. Inst. b. 2, c. 1, s. 27.

dence that he survived his father.¹ The principle of *bona fides*, in its more general sense, — that is, as regards the ordinary exercise of discretion, — of course applies to the justifying by trustees of claims made by them for exoneration or indemnity, in relation to the ordinary exercise of the discretion of their office, of which numerous instances have been noticed in treating of duties and liabilities.

2. In order to limit the liability of trustees to such an extent as is reasonable, just, and equitable, in the case of a party accepting of a gratuitous office to oblige another, and so more certainly to insure the acceptance of the office by those nominated, recourse has been had by conveyancers to the insertion of a special clause in trust-deeds, usually termed the protecting clause. The form of this clause, as in general use, is as follows:— “It is provided and declared, that the said —, or other trustee or trustees named or to be named as aforesaid, shall noways be obliged to do diligence otherways than as he or they shall think fit; nor shall he or they be liable for omissions, but only each of them for himself, and his actual or personal intromissions; nor shall they be farther liable for their factors, than that they shall be habit and repute responsible at the time of entering upon their office.”

As to the legal, or rather, more properly, the equitable interpretation and effect of this clause, as determined and applied by the courts of justice, it has been held, that it will not protect trustees where they exceed their powers² or do illegal acts;³ for it is

Limitation of
liabilities from
special ex-
emptions con-
tained in
trust-deeds.

¹ Bruce, 25th Feb. 1834, 12 S. 486.

² Watson, 9th June, 1843, 5 D. 1186.

³ Young, 15th June, 1841, 3 D. 1020.

evident, that no trustee, in declaring that accepting and acting trustees shall not be liable for the consequences which may attend their performance of specified or implied duties of the office, or for incidental omissions which may occur in the performance of them, can possibly provide for their doing acts not authorized by him. Neither is it the nature or object of this clause to interfere with, or in any way affect, the positive duties undertaken by trustees on assuming the office, but merely to relieve them from incidental liability incurred in fulfilling these duties. Thus it will not protect them where they refuse to concur in the ordinary administration of the trust-affairs.¹

*Or positive
duties
omitted.*

*Special pro-
visions.*

*As to dilig-
gence.*

*Omissions.
*culpa lata.**

As this clause consists of several special provisions, the effects of these may be considered separately.

The first provision of this clause, namely, that the trustee "shall nowise be obliged to do diligence otherwise than as he or they shall think fit," refers to the recovery of debts due to the trust-estate. The purpose of this part of the clause is, that as the exercise of considerable discretion is necessary in determining whether diligence should be done or not,—as, on the one hand, serious expense may be unnecessarily incurred, while, on the other hand, if diligence be not done, considerable loss may arise from prescription, unexpected bankruptcies of debtors, or otherwise,—it is necessary that trustees, in conducting the affairs of their office, should not be liable for duties of so discretionary a nature, for which they would be liable, were this provision not inserted.

The next provision is against liability for "omis-

¹ Lyndoch, 20th November, 1832, 11 S. 60.

sions." It has been observed, that under omissions are not to be included matters amounting to that *culpa lata*, which is equivalent, in its civil effect, to fraud, and that therefore, in judging of liability where there is an exemption for omissions, the question is, whether the trustee has been guilty of *culpa lata*?¹ It undoubtedly appears, that the principle of our law is, that the usual protecting clause cannot be held to liberate trustees from the consequences of gross negligence amounting or equivalent to, what is called *culpa lata*. But in the case of *Wallace v. Taylor, &c.*,² where a party had obtained a discharge under the bankrupt act, and conveyed his property to trustees, declaring them not to be liable for omissions, and the trustees allowed the trustor to intromit with part of the price of heritage sold, for the purpose of applying it to the payment of his composition, and a party who had become a creditor raised an action for decree of adjudication, and arrested the funds, the trustees were held not liable for the part of the price uplifted by the trustor, as they had not intromitted with it. This is perhaps as strong a case as any to which the special exemption could properly be extended, and can only be looked upon as a special case, in which the Court held there was not what amounted to *culpa lata*. In the case of *Ainslie, &c. v. Henderson's Trustees*,³ where the defenders had no actual intromissions, transgressed no order of the trustor or of the Court, were guilty of no fault, except a neglect or omission to see that the factor had lodged his receipts regularly in the bank, which

¹ Per Lord Glenlee, in *Cowan*, 13th May, 1836, 14 S. 744

² 23d Feb. 1832, 10 S. 364. ³ 26th Feb. 1835, 13 S. 417.

they had directed him to do, and it was not alleged that they had reason to entertain any suspicion of his credit till his bankruptcy took place, it was held, that, from exuberant confidence in their factor, they had acted imprudently and carelessly, but that it was an omission only, and not an act of transgression or a dishonourable act. So also in the very special case of *Cowan v. Crawford*,¹ where the chief question of liability for negligence amounting to *culpa lata* was alleged to have arisen from the trustees allowing the factor to become indebted in a large sum to the estate, during the course of the factory and at its termination, and, notwithstanding, taking no steps to secure the estate against consequent loss—and caution by the factor having been demanded at his entering into office, neglecting to call on the factor's cautioner, or to give him notice that a large balance stood against the factor at the beginning of his intromissions as factor, and continued to accumulate—and paying over to him a sum of money while he was confessedly indebted to the estate on unsecured and past due bills, and also on his factory accounts, to a very considerable extent—the liability of the trustee being also much enhanced by his blameable omission to keep any sederunt-book, minutes, or record of any kind of the trust-affairs, although the trustee was a man of business, and not resident on the spot—still no complaint having been made by the proprietor, who had died previous to this action being raised, and as it did not appear in the case that any thing had occurred to shew the impossibility of the factor making payment, or to create a doubt as to the

¹ 13th May, 1836, 14 S. 744.

cautioner, it was held that the trustee was protected from liability by the terms of the trust-deed, which contained the usual clause. So also in the case of *Home v. Pringle*,¹ where the factor was habit and repute responsible at the time of his appointment, and continued to be so until within a few days of his bankruptcy, which happened about ten years afterwards, he had not been required to find caution, and was then owing a large arrear, amounting to nearly one-half of the gross annual rental of the estates, an annual accounting had been held, under which it appeared that he had been considerably in arrear (the amount varying from one-eighth to one-fourth of a year's gross rental) at the close of every year after the close of the two first years of the trust, the long continuance of these arrears being known at least to one of their number, who was cashier, and who frequently urged him to pay up the balance, and the co-trustees of the factor at length revoked the factory, though not until the eve of the factor's failure, after which an action was raised on the part of the beneficiary against the co-trustees, as liable for the balance due by the factor, it was held that the negligence or remissness of the co-trustees, *qua* trustees, did not, in the circumstances, amount to *culpa lata*, and that therefore they were covered by the protecting clause contained in the deed.

The next provision of the clause, viz. that they shall be only liable "each of them for himself," is quite specific and distinct, as, were it omitted, the trustees would be liable *singuli in solidum*, whereas, by this provision, they are only liable for their own

¹ 30th November, 1837, 16 S. 142, Aff. 22d June, 1841, 2 Robin. Ap. 384.

individual acts or omissions, and not for those of their co-trustees.

Actual and personal intromissions.

The next provision, viz. that they shall be liable each for "his own actual and personal intromissions" only, is the sequel of the two previous provisions, and intimately connected with them. The question, whether there be *culpa lata*, has been held as a most important element in all questions of intromission. In the case of *Blain v. Paterson*,¹ which is the most explicit authority as to the act of intromission, it was held, that where money was uplifted by a trustee in virtue of a receipt signed by himself and two co-trustees, being a quorum, such uplifting was an act of personal intromission by the co-trustees who signed the receipt, and thereby enabled the acting trustee to uplift the money; and the same liability was held to attach to co-trustees who had signed receipts in regard to money similarly uplifted and retained by the acting trustee, without any promissory note being granted for it, or any obligation to give heritable security; and it was likewise held to attach to the representative of one of the co-trustees, although, within a year after the money was uplifted, that co-trustee had fallen into bad health, so as to be unable to attend to business, and had continued in bad health till his death, which happened several years after the insolvency of the acting trustee. Again, where there was what the Court held to be equivalent to *culpa lata*, it was held, that although, in strict and technical language, funds may not be realized, as where an acting co-trustee has not actually paid over the money to the trustees, and pro-

¹ 28th Jan. 1836, 14 S. 361.

cured a discharge from them, as debtor to the trust-estate, still, if the trustees sanctioned its continuance in his hands on their joint responsibility, the fund is virtually realized, and the trustees, notwithstanding the clause of protection, are as liable as if the fund had been uplifted and lent out by their sanction.¹ And in the very recent case of *Seton v. Dawson*,² where certain sums of money belonging to a trust-estate, were received after the trustor's death by one of the trustees, who had been "directed" by the others to realize the trust-property, without receiving any express appointment as factor for the trust—and this trustee acted generally in the management of the trust, and intromitted with the estate, but the deeds acknowledging receipt of these sums of money were subscribed by all the trustees—and after the first meeting no other meeting was held for upwards of eight years, by which time the managing trustee had become bankrupt, a large balance being then due by him to the trust-estate,—it was held that the trustees were personally liable for such balance, and were not saved therefrom by the protecting clause. So, likewise, where trustees brought a process of multiplepoinding and exoneratior, as to the balance in their hands, which was allowed, after the process was brought, to remain in the hands of one of their number, who subsequently became bankrupt, it was doubted whether the trustees might not have been made responsible for the fund *in medio*, notwithstanding the clause of protection, in respect of their having allowed the funds to remain in the hands of their

¹ Moffat, 31st January, 1834, 12 S. 369.

² 18th December, 1831, 4 D. 310.

co-trustee after an action of multiplepoinding had been raised.¹ But in the very recent case of Urquhart *v.* Brown,² where the period of distribution of certain trust-funds among beneficiaries had arrived, and a trustee, along with his co-trustees, signed an acknowledgment of a sum uplifted for that purpose, which sum was allowed to remain in the hands of one of the trustees for nearly six months for the purpose of distribution, and partial payments were made to beneficiaries, and the trustee became insolvent, it was held that the co-trustee who had signed the acknowledgment for the sum uplifted was not personally liable for it.³

Factors.

The last provision of the clause, viz. that they shall "not be farther liable for their factors than that they shall be habit and repute responsible at the time of entering upon their office," seems to have been held of little practical importance, as they are only so liable at common law, and as it has not been held to give protection in the case of *culpa lata*.⁴ But this only applies to the case where trustees appoint factors or agents under them, against whom there is no personal objection; for a general protecting clause will not give protection where trustees do acts which are in contravention of special limitations created by the trustor. Thus, where trustees were directed to invest a sum on proper heritable security, in favour of a married woman and her children, excluding the *jus mariti*, and they advanced the money to her husband, as their agent

¹ M'Nair, &c. 24th June, 1830, 8 S. 968. See also Grieve, 24th June, 1835, 13 S. 973.

² 7th June, 1843, 5 D. 1142.

³ See also Watson, 9th June, 1848, 5 D. 1182.

⁴ See case of Seton, *supra*, and page 273, case of Dalrymple.

in the trust, to be invested on such security, where-upon the wife, with his consent, granted to the trustees a discharge for the money, and the husband granted an heritable bond, but sasine was not taken till after a subsequent bond in favour of a third party was completed by infestment, it was held, that the discharge was ineffectual, and that the trustees were liable for the amount of the provision;¹ for here the trustees had employed a person who was disqualified from such an office by a personal objection implied in the trust-deed.

There is perhaps no subject connected with the important class of deeds now under consideration, which requires to be more thoroughly investigated and understood, than provisions against hazardous liability by trustees. As much difficulty has attended the interpretation, or rather the application, of some of the provisions of this clause, it may be necessary to inquire into its origin, nature, and objects, with a view to point out the sources of these difficulties, and the errors connected with them.

The difficulties which suggested the enactment of the statute 1696, c. 8, in the case of tutors and curators, the kind of trusts then of greatest importance and most frequent occurrence in Scotland, in like manner at a future period, when trusts of the kind now specially treated of came to be in general use for the settlement and administration of property, rendered necessary the adoption of a provision to be inserted in trust-deeds, with the view of affecting a similar object.² The similarity of the

origin, history, and effects of the clause.

¹ Mayne, 4th June, 1835, 13 S. 870.

² The act of Parliament is in these words : " That tutors nominate by a father to his children are persons in whom he reposeth the greatest trust, and

offices of tutors and curators and trustee led to the adoption, with little alteration, of the terms used in the act in question.

Principal case of difficulty.

The chief questions of difficulty which have arisen in regard to this clause, relate to the loss of funds by the insolvency of acting co-trustees or factors, in whose hands they have been allowed to remain, the point being, whether such is covered by the exemption from liability for omissions, limitation of liability to actual intromissions, and non-liability for factors.

Seton v.
Dawson.

This subject has been very fully considered by the Court in the case of Seton *v.* Dawson,¹ before referred to,² but much discrepancy of opinion existed on the bench regarding it. The opinion maintained on the one hand was, that although the clause may be effectual in some points, in others it falls short in effect of what has by some parties been supposed to be the intention of trustees, as it cannot be held to apply to *culpa lata*. On the other hand, the opinion that the clause is sufficient to give exemption in such a case, was rested on the ground, that although there was culpable omission in strict law, the clause gives protection against liability for every thing but wrong or *culpa lata*, that in the case in question

that the tutors nominate frequently decline the office, being unwilling to subject themselves to the hazard of omissions, of being obliged, *in solidum*, each of them for others ;" and providing, "that it is and shall be lawful for the father, by any act or deed in his *liege powte*, to make a nomination of such persons as he thinks fit to be tutors, and of such persons as he thinks fit to be curators to his children, during their minority, containing this provision and quality, that the said tutors or curators shall not be liable for omissions, but for their actual intromissions with the means and estate descending from the father, and other deeds of administration thereanent ; and that each of them shall only be liable for himself, and not *in solidum* for others," &c.

¹ See Appendix.

² Sup. page 311.

there was merely omission by placing too much confidence in another, amounting to an error of judgment or discretion, but not a culpable act. It being, therefore, an established point, that this clause does not give protection in the case of *culpa lata*, the points to be determined in regard to such questions are, what amounts to actual intromission, and to *culpa lata*?

It is this state of the question which has led to ^{special view.} the suggestion,¹ that intromission is a fact of little importance; the argument being this, that if *culpa lata* be the test of liability, of what avail is the fact of intromission? for if there be *culpa lata*, there is liability whether there be actual intromission (in whatever sense the term "actual" shall be interpreted) or not; and that if there be not *culpa lata*, there can be no question of liability. As to this it may be here observed, that the relative conclusive importance of the principles of intromission and *bona fides* may be very clearly illustrated by the recent case of Urquhart *v.* Brown, already noticed,² in which there was what in several cases already referred to has been held to amount to intromission, namely, the signing of documents authorizing the uplifting of funds; but still the trustee in question was not held liable for the loss of these funds by the failure of a co-trustee in whose hands they were, as they were allowed so to remain for a special and competent purpose, and not for an unreasonable time; and the other trustee was held not to be *in mala fides* in regard to them; not the fact, but the *bona fides*, therefore, being the test.

¹ Per Lord Jeffrey, in Seton, *et sup.*

² *Sap.* page 312.

Observations
on principles
of clause.

But with a view to put the question as far as possible on a proper footing, it must here be observed, that in all the cases above referred to, there was some circumstance in the conduct of the trustees by which the funds in question were positively placed, or allowed to remain in the hands of the factor or acting co-trustee, from the neglect following on which, liability must inevitably have been incurred, but for the protecting clause, which alone gives rise to difficulty. In observing specially the terms of this clause, and looking to its origin, it is evident that it expressly gives exemption from liability for omissions ; it also limits liability to actual intromissions, but it does not go the length of saying that exemption shall be given from liability for the consequences attending acts *ex proprio motu* of trustees. But it is evident that these provisions must be taken together ; for the question is, what are their duties under such circumstances, and what are their powers ? If they simply perform their duties, either express or implied, there can be no question as to their personal liability. If they exceed their powers, that is, do acts not authorized by the deed, the law, and indeed no principle of equity, can assume, that exemption was intended to be given for such, although not expressed. Then comes the question, if they perform an act which they are empowered to perform when necessary, in their own discretion no doubt, will the consequences arising from an omission or omissions following upon that act come under the class of omissions, or neglect of superintendence of the duties of the office, referred to by the clause ? or will it again, if combined or taken along with the limitation to actual intromis-

sions, have that effect ? These special provisions of this clause are, as we have seen, copied nearly verbatim from the provisions of the statute 1696, c. 8, and therefore, did a similar question arise under that act, its determination might form a guide in the present question. But it must be observed, that a moderate degree of trust first came to be perfected in the law of Scotland, in the case of tutors and curators ; and that their duties and liabilities were very strictly interpreted by the common law, which rendered the enactment of this act necessary ; and although in itself intended to have a liberal effect, that this act was strictly interpreted as regards liabilities, as being an alteration or departure from the established common law of the period. When, subsequently, a higher kind of trust, namely, that now under consideration, came to be in use, the duties and liabilities of that office were in like manner strictly interpreted at common law, and, consequently, a like relaxation was resorted to in the form of a protecting clause. The question, therefore, is, Whether, since the doctrine of trusts has come to be more fully matured and understood, equitable interpretation can be carried the length of holding, that a clause of exemption in general terms, such as that usually adopted in practice, is so liberal in its nature and intent as to exclude the strictness of legal interpretation in regard to matters which by liberal construction alone can be brought within its express terms ?

This clause is therefore in itself evidently defective for accomplishing the purpose intended, where that is of so liberal or exuberant a kind as to exclude liability for any thing except for wilful misconduct,

Effect of
clause

and for the accounting of each individual trustee for funds personally received by him, *in quantum lucratus*; or, indeed, even where it is intended to give positive exemption for acts (supposing them to be discretionary) on their part, beyond those of ordinary and necessary management; for it may distinctly be said, that exemption under this clause, considering its general and unspecific terms, has been extended by equitable interpretation in the cases above referred to, as far as the rules of equitable interpretation will justify. If, therefore, very extensive exemption from liability be the intention of the trustor or framer of the deed, more specific terms ought to be used; or, as the consideration of liabilities must always necessarily include that of the duties of the office, the latter should be very expressly declared, or specially limited, as regards the superintendence and disposal of funds, &c. in which case a clause in general terms, such as that usually adopted, may be sufficient, but not otherwise.

Illustration of
principles of
such clauses,
from law of
England.

These, then, appear to be the merits of the question as to the legal effect of the special provision usually adopted with a view to limit the liability of trustees in Scotland, which may be farther illustrated by the nature and effect of such provisions in the law of England, attending to the distinctions by which they are affected in the two systems. In England, trustees are not liable for each other,¹ and are not obliged to demand caution from their agents;² and, as regards factors, they are exactly on the same

¹ L. on T. 241; *Townley v. Sherborne*, Bridg. 35.

² L. on T. 234; *ex parte*, Belchier Amb. 220, per Lord Hardwicke.

footing as in Scotland, whether with or without a limitation in the deed as to factors. Special provisions as to these are, therefore, in so far, less necessary, it would seem, as to co-trustees, than in Scotland; and it is observed by Mr Lewin,¹ that "an express clause is usually inserted in trust-deeds, that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informs the trustee of the general doctrine of the Court, adds nothing to his security against the liabilities of the office. In *Westley v. Clarke*,² Lord Northington was inclined to attach some importance to the clause. "The testator," he said, "might direct the condition of his executors so as not to be questioned by his volunteers, (gratuitous donees.) The proviso, therefore, that one executor should not be answerable for the acts of another, though not very frequent in wills, was a good proviso between executors, and legatees who took under the will." But equity infuses such a proviso into every trust-deed;³ and a party can have no better right from the expression of that which, if not expressed, had been virtually implied.⁴ It is clear that, in later cases, the Court has considered it an immaterial circumstance, whether the instrument creating the trust contained such a proviso or not."⁵ Although, perhaps, not so necessary, such clauses

¹ *Law of Trusts*, 257.

² 1 Ed. 360.

³ See *Dawson v. Clarke*, 18 Ves. 254.

⁴ *Worrall v. Harford*, 8 Ves. 8.

⁵ *Brice v. Stokes*, 11 Ves. 319; *Bone v. Cook*, M'Clel. 161; S. C. 18, Price, 332; *Hanbury v. Kirkland*, 3 Sim. 265; *Moyle v. Moyle*, 2 R. and M. 710; *Sadler v. Hobbs*, 2 B. C. C. 114; *Mucklow v. Fuller*, Jac. 198; *Pride v. Fooks*, 2 Beav. 430; *Williams v. Nixon*, 2 Beav. 472.

thus stand in a very similar position in England,¹ for where, in general terms, either nothing is presumed which is not specifically stated, or they are unnecessary, as being in conformity with the law, precisely the same question arises in England which has given rise to such difficulty under the clause as adopted in Scotland, although not arising in the same form. By the protecting clause, with us, a trustee is freed from certain duties and liabilities; he is not liable for his co-trustees; he is freed, in a great degree, from being obliged to act, and cannot become liable for money without doing some act. The question, therefore, comes to be, What is an *act* in this sense? what is intromission? and how are they distinguished? By the law of England, as we have seen, trustees are not liable for each other, which rule of law must necessarily be at least as effective as any special provision to the same effect. But still the law of England makes an important distinction; for, as observed by Mr Lewin,² "co-trustees,³ however, as was determined in the case just stated,⁴ were

¹ A provision is very generally inserted in testamentary dispositions to trustees in England in these or similar terms: "Provided always, and I do hereby farther declare, that the said several trustees hereby appointed, and to be appointed, as aforesaid, and each and every of them, and the heirs, executors, administrators, and assigns of them, and each and every of them, shall be charged and chargeable respectively for such moneys only as they respectively shall actually receive by virtue of the trusts hereby in them reposed, notwithstanding their or any of their giving or signing, or joining in giving or signing, any receipt or receipts, for the sake of conformity; and any one or more of them shall not be answerable or accountable for the others or other of them, or for involuntary losses," &c.

² Law of Trusts, 243.

³ Townley v. Sherborne, Bridg. 35; Spalding v. Shalmer, 1 Vern. 303; Sadler v. Hobbs, 2 B. C. C. 114; and see Bradwell v. Catchpole, cited Walker v. Symonds, 3 Sim. 78, note (a); but see opinion of Lord Cowper, in Fellowes v. Mitchell, 2 Vern. 516.

⁴ Townley, *ut sup.*

formerly considered responsible for money, if they joined in *signing the receipt* for it; but, in later times, the rule has been established, that a trustee who joins in a receipt for mere conformity's sake, shall not be answerable for a misapplication by the trustee who receives.¹ Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity; it would be tyranny, therefore, to punish a trustee for an act which the very nature of his office will not permit him to decline. But it lies upon the trustee who joins in the receipt for mere conformity, to prove that his co-trustee was the person by whom the money was received. In the absence of all evidence, the effect of a joint receipt is to charge each of the trustees *in solido*.² "And though a trustee joining in a receipt may be safe in merely permitting his co-trustee to be the receiver in the first instance, yet he will not be justified in allowing the money to remain in his hands for a longer period than the circumstances of

¹ *Brice v. Stokes*, 11 Ves. 324, per Lord Eldon; *Harden v. Parsons*, 1 Ed. 147, per Lord Northington; *Westley v. Clarke*, 1 Ed. 359, per *eundem*; *Heaton v. Marriot*, cited *Aplyn v. Brewer*, Pr. Ch. 173; *ex parte Belchier*, Amb. 219, per Lord Hardwicke; *Leigh v. Barry*, 3 Atk. 584, per *eundem*; *Fellows v. Mitchell*, 1 P. W. 81; *Gregory v. Gregory*, 1 Y. and C. 316, per Baron Alderson; *Sadler v. Hobbs*, 2 B. C. C. 117, per Lord Thurlow; *Chambers v. Minchin*, 7 Ves. 198, per Lord Eldon; *Shipbrook v. Hinchinbrook*, 16 Ves. 479, per *eundem*; *Harrison v. Graham*, 3 Hill's MSS. 239, per Lord Hardwicke, cited 1 P. W. 241, 6th ed. note y; *Carsey v. Barsham*, cited *Joy v. Campbell*, 1 Sch. and Lef. 344, per *eundem*; *Anon. Case, Mose*, 35; *ex parte Wackerbath*, 2 G. and J. 151.

² L. on T. 243, 244; *Brice v. Stokes*, 11 Ves. 324, per Lord Eldon; *Scurfield v. Howes*, 3 B. C. C. 95, per Lord Thurlow; *Westley v. Clarke*, 1 Ed. 359, per Lord Henley; *Harden v. Parsons*, 1 Ed. 147, per *eundem*; *Fellows v. Mitchell*, 1 P. W. 83, per Lord Cowper.

the case may reasonably require."¹ In this last principle the law of England precisely agrees with our own law; it shews, when *culpa lata* takes place, and *e priori*, that the concurring in a receipt, discharge, or other document authorizing the uplifting or disposal of money, is equivalent to *actual intromission*; for it establishes the rule, that where a trustee so interferes, and thereby authorizes the disposal of trust-funds, he is bound to see that they be properly disposed of, and this although he is not otherwise liable for his co-trustees.

¹ L. on T. 245, *et seq.*; *Bone v. Cook*, M'Clel. 168; *Gregory v. Gregory*, 2 Y. and C. 313; See *Attorney-General v. Randell*, 21 Vin. Ab. 534; *Brice v. Stokes*, 11 Ves. 319, per Lord Eldon; *Walker v. Symonda*, 3 Sw. 65, 67, 71, per Lord Eldon.

P A R T III.

PURPOSES OF TRUSTS, AND DIVESTING OF TRUSTEES.



CHAPTER I.

CHARACTER AND INTERESTS OF BENEFICIARIES.

QUESTIONS in regard to the rights of individuals, or in other words, as to the objects or purposes of trusts, arise in three forms,— 1st, In regard to the powers and duties of the trustees; 2d, Where the trustee, doubtful of the nature or extent of his powers and duties, has recourse to judicial proceedings; 3d, Where those interested under the trust originate a competition among themselves in regard to their individual rights under the trust, as by judicial proceedings in name of the trustee or otherwise, during the subsistence of the trust, or by special action after its conclusion, brought either against the trustee, or party preferred by him, or both.

The questions as to the special interests of beneficiaries, as they may occur in trust-deeds, which strictly come within the province of a treatise such as this, are those in which the rights of individuals are affected by trusts as a special form of conveyance; for such questions in trusts relate either to the effect of those trusts as regards rights of property, or as regards the periods at which the interests of individuals, created by the trust-deed, become available, that is, vested in those parties; or

they are precisely similar in their nature to questions of executry nominate, and grants and conveyances in general, and therefore are governed by the rules and principles applicable to those subjects, as to be hereafter specially considered.

General
character and
interests of
beneficiaries.

1. As has generally appeared from the previous parts of this treatise, the circumstances under which trusts are chiefly resorted to, are in the arranging of family settlements of all kinds, such as marriage settlements—the administration of landed or other estates, so as to exclude or dispense with all interference by the proprietor—for the conveyance of heritage in a particular manner, as for making entails—or for the purchase of heritage and special conveyance of it, after the death of the trustor. They are also very generally used for the purpose of the trustees holding property for trading or manufacturing partnerships—holding property for religious societies—administering funds or estates destined to support local schools or the poor to perpetuity, with the power of electing or receiving successors, consisting of individuals nominated by particular bodies, as corporations, societies, &c.—or for effecting the sale of heritage, and its distribution among heirs and creditors—or the private management and distribution of bankrupt estates. There are also a large class of trusts of a subsidiary kind, which are created for special purposes, which have been already mentioned.¹

What may be termed, in a technical sense, the most strictly proper trust, is that where a party, who, being possessed of a landed estate, and indebted

¹ *Sup. page 30.*

to various persons, is desirous to give his creditors heritable security over that estate, and instead of granting heritable bonds for behoof of each of the creditors separately, or, in the case of an entail, for the purpose of more conveniently assigning the rents of the estate for that purpose, conveys his estate or liferent interest to trustees for behoof of his creditors generally. In the case of moveable property, trusts are of the highest importance, as they afford the means of converting it, whether money or otherwise, into a lasting estate, which may be burdened with liferents or other provisions, and its transmission insured to a series of individuals by substitution, thus giving it, in a great degree, the stability of heritable property.¹ So, in the law of England, a chattel real can, by will only, and not by deed, and a chattel personal can, neither by will nor deed, be limited to one person for life, with remainder to another; but, in trusts, a chattel interest, whether real or personal, can be subjected to any number of limitations, provided there be no perpetuity.²

The general rule or principle of interpretation which characterizes trusts, both in England and Scotland, is, that the intention of the trustor shall be carried into effect, provided it be not inconsistent with the law of the land.³ Thus, for instance, it is competent for an uncle to make it a condition that his nephew shall not reside in the same house with his mother; for such a provision may be fully

¹ See Duncan, 27th June, 1809, F.; Ramsay, 23d Nov. 1838, 1 D. 83, and see Vesting, *inf.* cap. 2, s. 2.

² Duke of Norfolk's Case, 3 Ch. Ca. 32; Lewin on Trusts, 103.

³ See Eng. Ca. of Attorney-General *v.* Sands, Hard. 494, per Lord Hale; Pawlett *v.* Attorney-General, Id. 469, per *cundem*; Bacon on Uses, 79; Burgess *v.* Wheate, 1 Ed. 195, per Sir J. Clarke; Lewin on Trusts, 98.

justified by reasons founded on the conduct of the mother; and, at all events, the trustor has the full disposal of his own property.¹

Distinction in English law.

By the law of England, trusts cannot be created with a proviso that the interest of the cestuique trust shall not be aliened, or shall not be made subject to the claims of creditors;² and if it can only be ascertained that the cestuique trust was intended to take a vested interest, the mode in which, or the time when, the cestuique trust was to reap the benefit, is perfectly immaterial,—the entire interest may either become vested in his assignees, by operation of law, on his bankruptcy or insolvency; and therefore, if there be discretionary powers conferred upon the trustees, these are determined by the bankruptcy or insolvency of the cestuique trust, and the entirity of the estate becomes vested in the assignees;³ the question in these cases being, whether, on the decease of the cestuique trust, his executor would have a right to call upon the trustees retrospectively to account for arrears? If he would, then the assignees are respectively entitled to the payments *in futuro*;⁴ the case of a discretionary power as to the application of the trust-funds for the support and maintenance of the beneficiary, and for no other purpose, being held an exception.⁵ But by the law of Scotland there is no such limitation. A trustor may declare such limitations, if he shall see fit, in all gratuitous trusts, the only limitation apparently being

¹ Reid, 5th March, 1813, F.

² Snowdon *v.* Dale, 6 Sim. 524; Green *v.* Spicer, 1 R. and M. 395; Graves *v.* Dolphin, 1 Sim. 66; Brandon *v.* Robinson, 18 Ves. 429; Lewin on Trusts, 99.

³ Green, and Graves, *ut sup.*; Piercy *v.* Roberts, 1 M. and R. 4; Rippon Norton, 2 Beav. 63; Snowdon, *ut sup.*

⁴ Lewin on Trusts, 101.

⁵ Twopeny *v.* Peyton, 10 Sim. 487.

in the case of trusts for creditors.¹ And this limitation by the law of England is evaded by declaring the trust to be in favour of A, *until* alienation, bankruptcy, or insolvency, with a limitation over to B.² And although a person cannot settle his own property on himself, with a limitation over, in the event of his own alienation,³ bankruptcy, or insolvency,⁴ yet, in marriage, he may so settle a fund equal to his wife's fortune.⁵

2. The only restriction as to parties who may receive property as beneficiaries under trust-deeds, as in the case of a party against whom there stands an unrecalled conviction of high treason, aliens who cannot receive heritage, and alien enemies who cannot so receive property of any kind, having no *persona standi in judicio*.⁶

The beneficiary interest, when vested, is an assignable or disponable personal right, or *jus crediti*.⁷

Where there is no substitution, service of benefi-

Special character and interests.
Who may receive as beneficiaries.

¹ See *sup.* part 1, c. 4.

² Shee *v.* Hale, 13 Ves. 404; Cooper *v.* Wyatt, 5 Mad. 482; Yarnold *v.* Moorhouse, 1 R. and M. 364; Lockyer *v.* Savage, 2 Stra. 974; Stephens *v.* James, 4 Sim. 499; *ex parte* Hinton, 15 Ves. 598; Lewes *v.* Lewes, 6 Sim. 304; *ex parte* Oxley, 1 B. and B. 257; Stanton *v.* Hall, 2 R. and M. 175.

³ Phipps *v.* Lord Eunismore, 4 Russ. 131.

⁴ Higinbotham *v.* Holme, 19 Ves. 88; *ex parte* Hill, 1 Cook's Bank. Law. 291; *ex parte* Bennet, Ib. 293; *in re* Murphy, 1 Sch. and Lef. 44; *in re* Meaghan, ib. 179; *ex parte* Hodgson, 19 Ves. 206.

⁵ *Ex parte* Cook, 8 Ves. 353; Higginson *v.* Kelly, 1 B. and B. 252; *ex parte* Verner, ib. 260; *in re* Meaghan, 1 Sch. and Lef. 179; *ex parte* Hodgson, 19 Ves. 206; *ex parte* Hill, 1 Cooke's bank. Law, 291; *ex parte* Hodgson, 19 Ves. 208. See Lewin on Trusts, 101.

⁶ See Nisbet, 16th January, 1834, 12 S. 293; Godfrey *v.* Dixon, Godb. 275; Br. Seal. us. 339, apl. 29; King *v.* Holland, Al. 14, per Bacon, J.; S. C. Styl. 21, per Roll. J. Gilb. on Usee, 48; Attorney-General *v.* Sands, Hard. 495, per Lord Hale; Fourdrin *v.* Gowdrey, 3 M. and K. 383.

⁷ Bushby, 23d June, 1825, 4 S. 110; Russell, 6th Feb. 1824, F. and *sup.* part 1, c. 9. As to the form of diligence competent against the beneficiary right, see *inf.* c. No. 2.

When investiture necessary.

ciaries is not necessary.¹ A party who has a vested right under a trust-deed, entitling him to call on the trustees to denude in his favour, may transmit his right to his heirs or gratuitous disponees, to the prejudice of parties substituted, named by the trustor to take, failing him, without being feudally invested in heritage so conveyed to him.² Where a party, conceiving himself to be feudally vested in lands, granted an heritable bond for a sum of money, containing a procuratory of resignation of the said lands, together with all right, title, and interest which he had, or could pretend to have, thereto, or to any part or portion thereof, it was held that the heritable bond contained an implied assignation of the *jus crediti*.³ But the representative of a beneficiary must be confirmed before he can oblige trustees to denude of moveables,⁴ and in heritage, he must expedite a general service, or otherwise establish his title to succeed to the beneficiary.

Liferent interest.

Jus relictæ.

In the case of a liferent interest, the liferenter is entitled to have the full amount of the fund conveyed for that purpose, secured for payment of the annuity.⁵ And the general rules as to liferent⁶ and *jus relictæ* apply to beneficiaries under trust-deeds.⁷ Where a party conveyed to trustees his share in a company concern, with power to them to assume his place therein after his death, until the concern should be wound up, and, after the trustor's death, the concern was managed prosperously for some

¹ Monroes, June, 1733, M. 12886.

² Gordon's Trustees, 4th Dec. 1821, 1 S. 185.

³ Paul, 22d May 1835, 13 S. 818.

⁴ Boyes, 12th Feb. 1745, M. 14417.

⁵ Wilson, 31st Jan. 1833, 11 S. 343.

⁶ See Cochran, 7th August, 1755, M. 8280.

⁷ See M'Neil, 8th Dec. 1829, 8 S. 210; Blake, 19th Dec. 1840, 3 D. 317.

years, during which his share was allowed to remain in it in the name of the trustees, for behoof of all concerned, after which it was paid up and realized, it was held, that one-third of the sum thus ultimately paid up, as the value of the deceased party's interest in the concern, fell under the *jus relictæ*, and that the widow was not restricted to one-third of the alleged actual value, as at the trustee's death, but was entitled to the profits accruing to her share.¹

The existence of a trust, and fulfilment of its purposes, may form a material element in determining the nature and extent of a right in an estate. Trust as an element in determining nature and extent of an estate. Thus, where, by an antenuptial contract, a sum had been invested in trustees, for behoof of the husband and wife, in conjunct liferent, and of the survivor of them also in liferent, and for the children in fee, the husband being bound to secure her a liferent of a certain amount per annum, and having thereafter purchased, with part of the principal sum, an estate, of which the disposition was taken to himself and wife, and the longest liver, and their heirs and assignees whomsoever, it was held, that the wife had only a liferent of the estate, and that the purchase had been made in implement of the obligation in the marriage-contract.² Here it was virtually held, that the special terms of the conveyance were qualified by the legal presumption, that the purchase had reference to the fulfilment of the trust-obligation, upon the principle, *debitor non presumitur donare*. Thus, also, by virtue of the special purpose for which the trust was created, where a lady, in contemplation of marriage, conveyed all her property to trustees for behoof of

¹ Ross, 3d Feb. 1843, 5 D. 483.

² Murray, 17th May, 1826, 4 S. 589.

children *nascituris* in fee, reserving a different alimentary provision to herself, exclusive of her husband's *jus mariti*, it was held that these funds were not attachable in payment of a joint bill by herself and husband, granted *stante matrimonio*, though alleged to have been given for sums advanced towards the maintenance of the family.¹

Combined capacity of trustee and beneficiary.

As already observed, no beneficiary interest can arise in any instance to a party *qua* trustee merely, the office and character of trustee and beneficiary being wholly distinct.² And the office of trustee does not interfere with the character and interests of claimants on the trust-estate, of whatever kind these may be, so as to prevent their co-existence.³

The beneficiary character attaches to all having a direct interest, and therefore a right to call the trustees to account. But the right of the beneficiary being merely a personal right of action against the trustee to fulfil the purposes of the trust, he can only, where the trustee is solvent, bring an action against the trustee, and not against third parties, or those appointed or employed by the trustee, who are accountable to the trustee alone.⁴ Thus, where

¹ Sandlands, 30th May, 1833, 11 S. 665. As to the nature of the rights of children, in trusts for their behoof, see *sup.* part 1, c. 9. The special interests of beneficiaries under marriage-contracts, copartnery trusts, and of creditors, are treated of separately, *infra*.

² See page 109, *&c. seq.*; Finnie, 30th Nov. 1836, 15 S. 165.

³ Paterson, 4th June, 1741, M. 8070; Keiller, 16th June, 1826, 4 S. 724; Telford, 12th May, 1835, 13 S. 735; Henderson, 13th Dec. 1825, 4 S. 306; Annand, 4th March, 1774, M. 5844.

⁴ So, also, in the law of England, an agent employed by a trustee is accountable to his principal only, and cannot, as a constructive trustee, be made responsible to the cestuique trust; *Keane v. Robarts*, 4 Mad. 332, 356, 359; *Davis v. Spurling*, 1 R. and M. 64, S. C. Taml. 199; *Crisp v. Spranger*, Nels. 109; *Saville v. Tancred*, 3 Sw. 141, note; *Nickolson v. Knowles*, 5 Mad. 47; *Myler v. Fitzpatrick*, 6 Mad. 360; *Fyler v. Fyler*, 3 Beav. 550.

Beneficiary interest, how rendered available.

desirous of having the trust brought to an end, the beneficiary may bring an action of count and reckoning against the trustee; and where there are other claims against the trust-estate, he may bring an action of multiplepoinding in name of the trustee.¹ In the case of Graham, &c. v. Hunter's Trustees,² where trustees acting for behoof of a married lady and her children, had employed a law-agent to secure a sum heritably, taking the liferent to the lady, excluding the *jus mariti*, and the fee to her children — and loss arose from error on the part of the trustees or the agent, — it was held, that she was entitled to bring an action in her own name against the trustees and the agent, for her own interest. But this was a special case, the law-agent being one of the trustees, the firm of which he was a partner being called for their interests. That such an action is in the general case incompetent, is evident, for as arrestment cannot be laid in the hands of a factor or agent, a furthcoming cannot be pursued; and moreover, a party cannot pursue an action who cannot give a discharge, and it is evident that a beneficiary could not discharge, in any respect, a party employed by his trustee. In such a case it would seem that the trustees are primarily liable, and that the proper course is for an action to be brought against the trustees, who may then call the agent as the party answerable, the trustees' defence to the action being, that they employed the agent as a professional person; and that, although bound to support the interest of the beneficiary by so calling the agent

¹ See *sup.* page 119; and *inf.* part 3, c. 9.

² 4th March, 1831, 9 S. 543.

into court, as they would have been bound to pursue him for reparation had no such action been raised on the part of the beneficiary, still they are not liable for loss caused by the error of the agent; and in the case of a factor, in like manner, that they are not liable for factors, where they, the trustees, do their own duty.

It frequently happens in practice, that a trust is created by a debtor, of which trust he or his family shall partially or totally become the beneficiaries. Thus, a debtor owing money which he is unable to pay, while at the same time he is regarded as a solvent party, may cause the debt to be paid by a friend, who takes an assignment to the outstanding bond or bonds, and assigns them to new money-lenders. In that case, the debtor is in the first instance the beneficiary deriving benefit by the intervention of his friend, while at the same time that friend acts as a trustee towards the new money-lender in settling the transaction. A similar proceeding in point of principle more frequently occurs in the case of an heir of entail paying debts that affect the entailed estate. He makes the payment by the intervention of a trustee, who takes an assignment to the debts, and holds them for behoof of the heir of entail, and his assignees and heirs-general. In such cases, the intervention of a trustee is rendered necessary by the principle, that were the debtor in his own person to come forward and pay the debt, the claim of the creditor would be thereby extinguished, and the fund merged in the entailed estate, and could not be employed either for the purpose of borrowing money anew, or of holding it as a fund for the benefit of an heir of

entail. Thus, in the case of *Mackenzie v. Gordon*,¹ where the proprietor of an estate which was burdened with real securities in favour of A and others, granted a security in favour of B, who was infest, and the proprietor then granted a private voluntary conveyance of the estate, *ex facie* absolute, to a party as his trustee and agent, for the more convenient payment of his debts—and the trustee paid the securities held by A and others, and took a conveyance of them *ex facie* absolute, in his own favour—and, after holding them in some instances for about six months, he conveyed them to parties making new loans to the proprietor on the proprietor's heritable bond, along with which these were conveyed as auxiliary securities—and for the most part the securities of A and others were retired by the trustee with the money of the new lenders—and in all instances the new lenders stipulated, when making the loan, that the securities of A and others should be conveyed to them by the trustee as auxiliary to the proprietor's heritable bond,—in a ranking and sale of the estate, there being a shortcoming of the price, it was held that the securities of A and others did not become extinguished *confusione* by being vested in the trustee, but were kept up and effectually conveyed to the new lenders, so as to be preferable in competition with the real right of B.

With regard to the protection of his rights by a beneficiary, from improper conduct on the part of trustees, the beneficiary, whether existing or subsidiary, is fully entitled to adopt legal measures for

Protection of
his right by
beneficiary.

¹ 16th January, 1838, 16 S. 311.

that purpose during the subsistence of the trust. But he is not entitled to interfere with the trust-actings by such or any other course, for trifling causes.¹ Improper conduct on the part of trustees may be put a stop to by interdict.² But the most usual and suitable course is by application for removal. Damages may of course be obtained for injury done to the estate by improper acts or neglect of duty; and that even after the trustee shall have been exonerated, if the beneficiary can shew that he was necessarily ignorant of the facts by which injury to the estate has been sustained. He is also entitled to compel the trustees to fulfil the duties of their office under the deed; as by compelling them to assert or defend the rights of the estate;³ and is at all times entitled to know the state of the trust-affairs.⁴

General rule. The general rule in regard to the effect of the acts of trustees, upon the rights of individuals, is, that they cannot be affected by them, unless in so far as specially authorized by the deed. The general rules in regard to the exercise of powers of provision by trustees have already been considered.⁵

Whatever amounts to *surrogatum* (equivalent to

¹ See *sup.* page 123.

² So, also, in England, by injunction, whether the act be remediable or not; *Balls v. Strutt*, 1 Hare, 146; *Corporation of Ludlow v. Greenhouse*, 1 Bl. N. R. 57; *In re Chertsey Market*, 6 Price, 279, 281; *Attorney-General v. The Foundling Hospital*, 2 Ves. jun. 42; *Pechel v. Fowler*, 2 Anst. 549; but see *Anon. case 6*, Mad. 10; *Webb v. Earl of Shaftesbury*, 7 Ves. 487, 488; *Reeve v. Parkins*, 2 J. and W. 390; *Milligan v. Mitchell*, 1 M. and K. 446; *Attorney-General v. Mayor of Liverpool*, 1 M. and C. 210.

³ See *sup.* pp. 222, 267.

⁴ See *sup.* pp. 217, 218; and Eng. Ca. of *Foley v. Burnell*, 1 B. C. C. 278, per Lord Thurlow; *Cary*, 14; and see *Kirby v. Mash*, 3 Y. and C. 295; and *Cole v. Moore*, Mo. 806.

⁵ *Sup.* part 2, c. 4.

conversion in the English law¹) cannot, of course, injure the rights of beneficiaries, any more than of co-trustees.²

Where a party appointed trustee in a deed in the English form, transferred the trust-funds to the party first favoured in the deed, and obtained from him a discharge, and, more than forty years thereafter, one of the parties favoured in the trust brought an action to have his right ascertained, it was held to be cut off by negative prescription.³ Where the office of trustee is held by one individual only, and he becomes bankrupt, one of two cases may occur,—first, that he holds that office in virtue of the deed, which, *in gremio*, declares that the property is vested in him in the character of a trustee; or, secondly, that he holds the office in virtue of a title of property *ex facie* absolute, and that his character of trustee depends on evidence resulting from a latent back-bond or other obligation. In the first case, so far as the trust-estate consists of lands, it remains safe to the beneficiaries; so far as it consists of effects unsold, or debts not uplifted, it is likewise safe; so far, also, as it consists of money lent by the trustee, and the obligation taken to himself, in his character of trustee, it is safe; but so far as the trustee may have recovered money, and so mixed it with his own funds, that its identity cannot be traced, it will belong to his creditors generally, and the beneficiaries, or factor acting for their interest, can only rank with his other creditors on his bankrupt estate. In the second case, where a trustee is vested with the property in virtue of a title *ex facie*

¹ See L. on T. c. 25, sect. 2, page 629, *et seq.*

² Pollock, 23rd Jan. 1778, M. 10702.

³ See *sup.* page 232.

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absolute, his whole actings, impignorations, &c., bind the trust-estate in favour of those third parties who *bona fide* have had dealings with him, leaving to the beneficiaries of the trust merely such redress as may be obtained by ranking on the estate of the trustee.¹ In such a case, questions of considerable difficulty, in point of evidence and otherwise, occasionally arise, of which some instances have been noticed.²

¹ In England, the trust-property may be recovered from the bankrupt estate by suit in equity; see *sup.* page 8. In the case of moveables, it must of course be distinguished from the rest of the estate, as being in a bank in name of the trust, or otherwise, as in our own law.

² See *sup.* pp. 231, 232, 233.

CHAPTER II.

PURPOSES OF TRUSTS, AS REGARDS QUESTIONS OF SUCCESSION.

SECTION I. — QUESTIONS ARISING FROM THE NATURE OF THE SUBJECT CONVEYED.

WHERE the property conveyed is personal, there ^{Personal} ^{property.} can be no difficulty as to the party to whom it is intended that the interest shall belong, as it will either go to the party specially named, where there is such, or to the heirs in moveables of the beneficiary. But where the trust includes real property, questions frequently arise as to whether the interest in the beneficiary be heritable or moveable, which is of much importance as regards succession. If this *jus crediti* be not otherwise disposed of by the beneficiary, it will descend to his representatives. The intention of the trustor will then be the rule as to whether the trust-property shall be heritable or moveable, *quoad* the succession of the beneficiary; and the trustee being in fact a mandatory, has no power to do any thing to alter the succession, unless he be authorized to do so. Thus, where trustees under a marriage-contract were empowered to lay out a sum of money provided to the wife, on

security, either real or personal, having lent it on an heritable bond, taken, not in terms of the destination in the contract, but to the husband in trust for the uses in the contract — and it did not appear that the wife had specially sanctioned or known of this investment,— it was held, that it did not so alter the character of the fund in regard to the matter of succession, as to preclude her bequeathing it by will.¹ In the case of *Davidson v. Kyde and others*,² where a party in the East Indies remitted money to his attorneys in Britain, with discretionary powers as to the kind of security to be taken in investing it— and they, with his approbation, took heritable bonds in Scotland, payable to themselves in trust for him, — it was held, that he could not dispose of the money so secured by testament. But the order of succession was in this case in no way affected by any act at the mere individual instance of the trustees themselves, but from the special act of the trustor in granting a discretionary power as to the nature of the property in which the investment was to be made; or rather the act of the trustor in adopting that kind of property which cannot be conveyed by testament.

Heritable
property.

Heritable property dispossed by a party in trust to be conveyed to another, goes to the heir of the beneficiary ; for although the right in the beneficiary be moveable, and subject to personal diligence at the instance of his creditors, still the intention of the trustor is to convey it as an heritable subject, and therefore it goes to him as such. Whilst invested in trustees for his behoof, it is a mere personal right

¹ *Berford*, 1st June, 1832, 10 S. 609.

² 20th Dec. 1797, M. 5597.

which belongs to him, but when once made available, his right becomes real, for it is his right which has been affected by the trust, and not the subject conveyed. So, therefore, when made available by his successors, it retains its original character, as conveyed by the trust, and goes to his representative who has the right in that species of property, *viz.* the heir. The same rule holds as to money left to trustees for the purpose of being laid out in the purchase of heritage, for it is made heritable *destinatione*. But where trustees are directed to invest a sum on heritable security to answer an annuity, but the fee is not destined to any special party; on the death of the annuitant, the fee, being set free, becomes moveable.¹

Where heritage is conveyed to trustees for the purpose of being sold, and the proceeds conveyed to certain parties, as the children of the trust, the beneficiaries have no *jus in re specifica*, but a mere claim for a certain sum; and therefore the *jus crediti* of the beneficiary is moveable, and must go to his executors.² Accordingly, in the somewhat remarkable case of *Dick v. Gillies*,³ where a party conveyed his property, consisting in part of heritage, but chiefly of money, to trustees, with directions to convert the heritage into cash, and lay out certain sums on heritable security to answer annuities—and provided a sum of L.2000 to the children of his sister, if she should have any, but that if she should die without issue, it should be disposed of as directed in regard to the residue—and he appointed the residue, including the sums which might become

Money to be
laid out in
purchase of
heritage.

Heritable in-
vestment.

¹ *Carfrae*, 3d Feb. 1842, 4 D. 605. ² *Angus*, 6th Dec. 1825, 4 S. 279.

³ 4th July, 1828, 6 S. 1065.

disengaged by the death of the annuitants, to be divided among charitable institutions—and left a brother and sister—and the brother collated—and the sister, after executing a postnuptial contract conveying all her moveable rights to her husband, died without issue before the heritage was sold, or the whole sums invested as directed by the trust,—it was held, in a question as to her succession between her brother as her heir-at-law, and her husband, that the price of the heritage directed to be sold was moveable, that the sums directed to be laid out on heritable security were heritable, that the collation did not affect this question, and that as no part of the £2000 had fallen into the residue until after her death, it did not vest in her, and consequently did not pass to her husband.

Evidence of intention to sell.
Power of sale. A provision as to sale will not affect the succession, unless the intention or purpose of conveying it as a moveable subject be evident. In the case of *Burrell v. Burrell*,¹ where a trust-disposition and settlement containing powers to the trustees to sell the whole or part of the heritable property thereby conveyed, for the payment of debts, legacies, &c. and with instructions to pay over the reversion of the whole estate, heritable and moveable, or to denude of such parts thereof as might then be in their hands unconverted into money, in favour of the heir, upon his attaining the age of twenty-five—and the heir, having attained that age, died before the trustees had denuded in his favour,—it was held, that the heritable subjects which remained unsold by the trustees at his death, descended to his heirs, and not

¹ 14th December, 1825, F. 4 S. 414.

to his executors. But great difference of opinion existed on the bench, it being contended that there were precise directions to sell, that the term "may be sold" was, in effect, "might be sold," that the children had no right to a specific subject; the right was in the trustees, and the children had a mere *jus actionis*, which is moveable, according to the case of *Gordon v. Harper*.¹ But it is plain that the trustees held an heritable estate, and unless bound to sell it, they clearly held it for the heir in heritage, and the deed here anticipated heritage remaining in the hands of the trustees. But the principle applicable to questions such as this has been more clearly shewn in the subsequent case of *Cathcart v. Cathcart*,² in which there being a trust-disposition and settlement conveying the whole property of the testator, heritable and moveable, to trustees for the payment of the testator's debts and legacies, with a power of sale, and declaring that the residue should belong to a person who was the testator's heir-at-law, and his heirs, who were appointed residuary legatees—and desiring the trustees to assign, dispone, and pay over the same accordingly—and the moveable property of the testator being more than sufficient for payment of all the testator's debts and legacies, so that the trustee did not require to sell, and had not even made up titles to the heritable property,—it was held, in a competition between the heir and the executors of the immediate heir-at-law and residuary legatee of the testator, the former having predeceased the latter, that the heritable subjects not disposed of by the trustees

¹ 4th Dec. 1821, F.

² 26th May, 1830, F. 8 S. 803.

were to be considered heritage, and went to the heir of the residuary legatee, not to his executors; for there was here a mere power to sell, and no express direction to do so, and therefore no evidence of intention to alter the succession, if the sale should be unnecessary. The grounds of this decision appear to be the same as in the much earlier case of *Durie v. Coutts*,¹ where the testator declared his intention to be, that his whole property should be vested in certain trustees, that his houses, &c. should be sold, "if they thought fit," and that the produce of his heritable and personal estate should be applied in manner after mentioned. It then made over to the trustees, "for the use and behoof," in the first place, of the heirs of his body, whom failing, certain others specially mentioned, all and sundry heritable subjects that should happen to pertain to him at the time of his death, and particularly an heritable debt of £.2000, affecting certain lands in Scotland, together with all and sundry debts and sums of money, as well heritable as moveable; and the conveyance being burdened, beside the grantor's debts, with the payment of various annuities and other legacies. The beneficiary in whom it had come to belong, being resident in the Isle of Man, bequeathed her whole effects, real and personal, to a certain party, by a nuncupative will, the heritable debt not then having been paid to the trustees,—although it was so soon after,—a question arose as between the testamentary heir, and the heir by the law of Scotland, as to whether the right under the trust-deed was heritable or moveable, and the sum due by the heritable security

¹ 30th Nov. 1791, M. 4624.

was held to be heritable. This case also appears to be precisely in point in such a question as that in the case of Burrell.¹

In the recent case of *Patrick v. Nichol*,² where a testator conveyed his whole property, which was chiefly heritable, to trustees, with full powers (but no directions) to sell, but apparently contemplating the conversion thereof into cash, the directions being, that after payment of debts, the residue was to be invested on good security by the trustees, and held by them for behoof of certain parties named in the settlement, whom failing, for behoof of the testator's nearest heirs whatsoever — and four years after the death of the testator, the succession opened to the heirs whatsoever, the trustees having paid the debts and expenses with the moveable funds, and effected no sale of the heritable property, — it was held, that the heir-at-law, and not the executors, was entitled to the residue of the trust-estate.

The principles applicable to such questions are very clearly brought out in a judgment by the Lord Ordinary, (Corehouse, whose judgment was acquiesced in by the Court,) in the case of *Finnie v. Lords of the Treasury*,³ in which a testator who had no heir or next of kin, had conveyed his whole estate, heritable and moveable, to trustees, who were also named executors, power being given to sell all or any part of the heritage, which power the trustees were required to exercise — and the purposes of the

Principles
applicable to
powers of sale.

¹ As to questions of heritable and moveable, as affected by the period of vesting, see Thorburn, 16th Feb. 1836, 14 S. 485 ; and *inf. c. 2, s. 2.*

² 7th Dec. 1838, 1 D. 207 ; see also Murray, 30th June, 1836, 14 S. 1049 ; Ramsay, 26th June, 1833, 11 S. 786 ; Strachan, 21st Feb. 1843, 5 D. 687.

³ 30th Nov. 1836, 15 S. 165, and *supra*, part 1, c. 9.

trust were to be declared in a separate writing—and that writing specified a variety of legacies to be paid, the debts and legacies more than exhausting the moveables left by the testator, a considerable residue remaining unappropriated after the heritage was sold, and all debts and legacies paid—and the trustees claimed a share of the residue *qua* executors,—they were held to be only trust-disponees, and therefore to have no such right. His Lordship, in a note, observes,—“It is true that cases may occur, and have occurred, in which a truster has so clearly expressed his intention that his heritable property should be converted into money, as to warrant the legal conclusion, that it was to be treated as moveable as to succession. Such seems to have been one of the points which, among others, was decided in the case of *Dick v. Gillies*, 4th July, 1828. But the present trust-deed is not of that kind; it is granted for purposes to be named in a separate deed, and it contains a power of sale, from its mode of expression clearly discretionary, ‘to sell all or any part of my lands or estate,’ the effect of which does not appear to be taken off by the parenthetical and superfluous expressions, ‘who are hereby desired and required to exercise such powers.’ The clause authorizing the calling up and discharging the heritable or personal securities, is in the form of a power, and nothing else. There is no direction to convert his whole property into money; and, what is of great importance, there is no appropriation of the residue leading to any implication that such a conversion was in the truster’s view. No doubt he has by his last will left legacies, which will deeply encroach upon the heritable estate. But

it does not appear that circumstance can affect the character of the residue as regards succession. In substance, the present case appears exactly identical with that of a party conveying his land estate in trust, with a power of sale for the payment of certain legacies set down in the trust-deed, without any farther direction ; a settlement which, though of course creating moveable rights in favour of the legatees, would leave the residue heritable in regard to the heir ; and certainly would not, without some farther and very strong indication of the testator's intention, let in his next of kin. In short, if the competition had arisen for the residue between the heir of the testator and his next of kin, it must have determined in favour of the former."¹

Where the proprietor of lands really burdened

¹ Considerable discussion of questions of heritable or moveable, as to resulting trusts, will be found in Lewin on Trusts, 135, *et infra*; but the analogy of the English law, as regards such questions, is not rashly to be adopted in Scotch law, on account of the strict forms of our feudal conveyancing. But the general rules of both are, that money directed to be employed in the purchase of land, or land directed to be sold, and turned into money, shall be considered as that species of property into which it is directed to be converted ; see *Fletcher v. Ashburner*, 1 B. C. C. 499 ; and *Wheldale v. Partridge*, 5 Ves. 396. In cases where the conversion is merely optional in the trustee, the original character of the property continues until the discretion has been exercised, and the conversion actually effected ; as, if the discretion be to lay out money in lands or securities, in freeholds or leaseholds, or if by any other mode not imperative ; *Curling v. May*, cited ; *Guidot v. Guidot*, 3 Atk. 255 ; *Amler v. Amler*, 3 Ves. 583 ; and see *Van v. Barnett*, 19 Ves. 102 ; *Walker v. Denne*, 2 Ves. jun. 170 ; *Davie v. Goodhew*, 6 Sim. 585 ; *Wheldale v. Partridge*, 5 Ves. 388, S. C. 8 Ves. 227 ; and see *Abbot v. Lee*, 2 Vern. 284 ; *Polley v. Seymour*, 2 Y. and C. 708. Where the uses declared are exclusively applicable to real estate, the direction will be construed to be imperative, though the instrument shall, for instance, contain an authority to invest the money upon securities until a purchaser can be found ; *Edwards v. Countess of Warwick*, 2 P. W. 171 ; *Earlom v. Saunders*, Amh. 241 ; and see *Davies*, *ut sup.* ; or, the fund being already out upon security, a power is inserted to call it in, and lay it out upon other securities ; *Thornton v. Hawley*, 10 Ves. 129 ; and see *Triquet v. Thornton*, 13 Ves. 345 ; or even where the direction is to lay out the money on lands

Reserved
burden.

with an annuity, conveyed them to a trustee to be sold, with a declaration, that out of the price to be obtained, a certain sum should be set aside, and made a real burden on the lands to answer the annuity—and having died after the lands were sold, but before any conveyance was executed in favour of the purchaser,—it was held, in a question with the widow of the trustor, that this sum was heritable, and not subject to the *jus relictæ*.¹

Principles
applicable to
purposes of
sale.

On the other hand, in the recent case of Williamson v. the Advocate-General,² where there was a conveyance to trustees, for certain purposes mentioned, with full power to uplift, or discharge, or convey the principal sums contained in several heritable bonds thereby assigned, and to call in all sums of money and debts due to the trustor, or to sell all heritages, and other usual powers, it being declared that the trustees should be bound and obliged, after the sale of the said lands, &c. disposed—“which I recommend to them to be done as soon as convenient, after this trust opens to them”—to pay debts, legacies, and perform other obligations; a certain provision also being made, for the reason

or securities, the intention in the last case being supposed to be, that the money shall be invested upon security until a suitable purchase can be found, and that the interest and dividend, in the meantime, shall be paid to the person who would be entitled to the rents ; Earlam, *et seq.*; Cowley v. Hartstone, 1 Dow, 361. In the case of land to be converted into money, if an estate be directed to be sold, and the proceeds to be made payable to a certain party, the property, though unconverted at A's decease, will pass by a general bequest of all his personal estate ; Stead v. Newdigate, 2 Mer. 521 ; and, if he die intestate, will vest in his personal representative ; Asby v. Palmer, 1 Mer. 296 ; Biggs v. Andrews, 5 Sim. 424 ; Burton v. Hodson, 2 Sim. 24 ; Grieveson v. Kirrop, 2 Keen, 653. See also L. on T. 668, 683, 684.

¹ Baillie's Trustees, 2d June, 1832, 10 S. 617.

² 16th March, 1843, 2 Bell's Ap. Ca. 89.

that "it will require time, after this trust opens to my said trustees, before they can turn my heritable subjects into cash;" it being farther declared, in a subsequent testamentary deed referring to the previous trust-deed, "My trustees are required to turn my means and effects, hereby conveyed in trust, into money," to be disposed of in a certain manner stated—an arrangement having been made between the parties interested, whereby the sale of the heritable estate was rendered unnecessary, a question arose as to whether the heritable estate in question was subject to legacy-duty. It was held to be so, on the grounds,¹ that the whole question arose upon whether or not there was a direction to sell, that the state of the property, whether land or money, at the time of the death of the testator, was the only question, and by that state at that time must be determined both the rights of private parties and the rights of the Crown; that this was a totally different case from Evans,² for in it the expression was used, "sell such part of the estate as may be wanted for the purpose of paying debts," and deal so and so with the residue: that such was not the case in question, which was to sell the whole, whether it might be wanted or not, and deal with the residue in a totally different manner—give it not to the heir-at-law, but give it to the next of kin; it was not an estate of personality at all, it was a charge upon the reality: that as to the case of Durie *v.* Coutts, the words are, "if he shall think fit," words empowering and giving discretion: that the author of the deed would never in that case have said, "Whereas, I have *required* my trustees

¹ Per Lord Brougham.

² 2 C. M. and R. 206.

to sell ;" he would have said, "Whereas, I have empowered my trustees to sell ; it was a mere power to sell : that the case of Cathcart was a totally different case, the remarkable difference being, that the person to whom the estate was made over, was the heir-at-law. It was also farther observed,¹ that it is not necessary that the words of the power should contain an absolute direction to the trustees to sell ; the intention of the testator may be gathered from all the provisions of the deed ; that if the term *required*, as used by the trustor, had occurred in an English court of equity, and the question was, whether it was a power out and out, there would have been no doubt that it was ; and that cases have occurred in Scotland, which shew that the rule of decision there has been founded upon the same principle as in England, and, therefore, that the law is the same in the two countries.²

Trust-adjudication. A trust-adjudication is heritable *quoad* the succession of the constituent.³

SECTION II. — AT WHAT PERIOD BENEFICIARY INTERESTS VEST.

THIS subject, depending as it does almost entirely upon the interpretation of individual intention in special cases, may be said to be one of considerable difficulty and uncertainty. The existing authorities can scarcely be looked upon as any thing

¹ Per Lord Cottenham.

² See Attorney-General v. Hloford, 1 Price, 426 ; Advocate-General v. Ramsay's Trustees, appended to Evans, 2 C. M. and R. 224.

³ Crawford, 22d May, 1838, 16 S. 1017. As to questions of succession regarding creditors under trust-deeds, see *inf.* c. 8.

more than the interpretation of special intentions only in a limited degree tending in their results to establish general principles or rules of interpretation, seeing, that in establishing a principle, the chief element of value is the anticipation of events of a similar class, varying more or less as regards minor details; and as in questions such as the present, the purposes, wishes, or intentions of trustees—which are the only absolute rule—are as varied as the circumstances under which they originate. But still certain points have been determined, which, when taken together, are of value in every discussion of special intentions, however special or peculiar.¹ It is therefore necessary here to consider the particular circumstances in which such questions have arisen.

The principal points determined as to the effect General rules. of a conveyance to trustees, and the vesting of the trust-property in those having the beneficial interest therein, are :—

1. Where property is conveyed to trustees for the performance of a special purpose, the property becomes vested in them, and remains so until that purpose shall be fulfilled; but although vested, it is not so to the exclusion of the vesting of ulterior interests, where these are certain, and not conditional or contingent interests merely, for an interest which is truly contingent can never vest until the contingency is purified.

2. Where property is conveyed to trustees for behoof of one party in liferent, and for behoof of another party in fee, the property is vested in the trustee for the purpose of providing for the

¹ See Ralston, 8th July, 1842, 4 D. 1498, per Lord J. C. Hope.

payment of the liferent, and thereafter the fee to the party named; but the fiar's interest being certain, and merely postponed until the intermediate purpose shall be fulfilled, he has in law the same interest as he would have in any ordinary case of property vested in trustees for his immediate behoof; that is, he has an assignable personal interest or right of action against the trustee to fulfil the conditions of the trust, the liferent being a mere burden thereon.

3. Where property is conveyed to trustees for behoof of one party in liferent, and for another party in fee, whom failing, for another party, then, as the property is vested in the trustees, and must remain so until all the purposes of the trust shall be fulfilled, as an ulterior purpose is as much a declaration of will as one which is preferred, the ulterior interest prevents the fee from vesting in any party until the event shall occur, when a right has arisen in some party of demanding that the trustee shall denude in his favour, namely, the death of the liferenter; for until that event, it cannot be known who is to have such right. There can be no question as to the pendency of the beneficial interest, apart from the fee, for the beneficial interest is itself latent until the condition shall be fulfilled, and the interest brought into action.

Qualified by
Intention.

These, although general rules, are not inflexible; for any special declaration of intention on the part of the trustor, or any circumstance or act to be performed by the trustee, necessarily shewing that the trustee was understood and expected to remain invested with his office, in the absence of a declaration shewing distinctly that an interest shall vest in the beneficiary, the fee will remain invested in the

trustee till the purpose be fulfilled, after which only a vested interest can arise where there is an ulterior purpose, whilst, on the other hand, any declaration of an act to be done, shewing existence of a present interest, as to make payment during the existence of a liferent, will establish the vesting. This rule, as to a special purpose, applies whether there is or is not a liferent interest.

Where there is a clear *delectus personæ*, — that is, a certain individual specially named, and no mention made of heirs and successors of any kind,—the existence of trust will not take the fee out of the general rule, that a legacy to a special individual lapses by his predeceasing the disposer.¹

The first cases to be mentioned, in which questions have occurred as to the vesting of beneficiary interests, are, where property is conveyed to trustees for behoof of a certain party, or certain parties, the trustees being directed to denude in their favour, on the occurrence of a certain specified event.

Where a bequest under a trust was presently payable, but subject to the event of a discharge being got by the beneficiary from certain creditors of his own, a different rule being appointed to take effect in a certain other event, which did not take place, the beneficiary having died, it was held, that the period of payment, but not of vesting, had been suspended, the intention to bequeath being clear.²

In the case of *Ralston v. Ralston*,³ where trustees were appointed to make payment of a certain sum

Delectus personæ.
Predeceasing trustee.

Trustees to
denude in
a certain
event.

Interest
presently
payable.

¹ Hamilton, 8th Feb. 1838, 16 S. 478; see also Paterson, 4th June, 1741, M. 8070.

² Johns, 29th Nov. 1838, 12 S. 146.

³ 8th July, 1842, 4 D. 1496.

to A, and, in the event of his death, to B and C, (his sisters,) or, in the event of the death of either of them, to the survivor, with the interest thereof from six months after the testator's death, payable to their guardians for their behoof, the principal sum being payable to A on arriving at majority, or, in the event of his decease, to B and C, or the youngest, or the survivor of them, arriving at majority,—A, B, and C, having all survived the testator, but died in pupilarity,—it was held, in a question between their nearest of kin and the testator's residuary legatee, that the right to the legacy had vested in A upon the testator's death. The grounds of this decision were, that although the trustor, providing for the case of minority, had declared that the capital sum should remain in the hands of the trustees until the majority of A, or the survivor of A and B, the general direction to the trustees to pay over to them, created an absolute conveyance for their behoof, and that the actual and immediate enjoyment of the fruits and profits is, in the absence of an express declaration to the contrary, a conclusive test as to the vesting of a right or interest in the principal sum, the fruits or interest of which are so given.¹ And where trustees were, *inter alia*, directed to invest a sum of money in one of the public funds, for behoof of a certain party, the produce thereof to be accounted for yearly, and the principal sum transferred to him as soon as he should arrive at the age of twenty-one years complete, the beneficiary having died in minority, it was held, that the stock was

¹ *Ibid.* per Lord J. C. Hope.

meant to vest immediately, the yearly produce being ordered to be accounted for to him.¹ So also where a trust-conveyance was made for behoof of two brothers, share and share alike, the interest to be paid to their mother, until their respectively attaining majority, and one of them died in minority, leaving a settlement, it was held that the property had vested in him, *a morte testatoris*, as a mere intermediate disposal of interest such as this, creating no contingency, could not in any way limit the absolute right.²

The nature and effect of a destination over as <sup>Destination
over.</sup> regards the vesting of beneficiary interests, has been very fully considered by Lord Fullerton, along with the authorities applicable thereto, in the case of *Ramsay v. Ramsay*.³ It is there observed, that, in the case of *Campbell v. Campbell*,⁴ a bequest of goods, money, and

¹ Wood *v. Burnet's Trustees*, 2d July, 1813, Hume, 271. In a question of a nature similar to those now under consideration, which occurred in the case of a *mortis causa* disposition of his whole estate to his son, burdened with L.2000 to each of the disposer's three younger children, the one-half of which sums to be due, and become payable, at their respective majorities or marriages, which of these events should first happen, and the other half at the death of their mother ; it being farther declared by codicil, that the one-half of the said provisions in their favour should bear interest from and after the first term, and subsequent to the death of the party bequeathing, but that the other half of the said provisions should only bear interest, and be exigible by them, from and after the decease of the mother ; and, by a subsequent codicil, that, in the event of their deceasing without leaving issue of their bodies, then existing, L.600 of each of their provisions should return to the disposer's heirs-at-law. One of the legatees having died in minority and unmarried, it was held, that one-half of the said legatee's share lapsed, being pendent on the condition of majority or marriage, which never arrived ; that the case of Burnet was ill-decided, and the point was settled the other way in the later cases of Omey, Sempil, and others ; that the other half vested, though suspended in point of payment till the mother's death, being *dies certus*, that will happen, though uncertain when ; *Home v. Home*, 28th January, 1807, Home, 530.

² Wilson, 9th July, 1842, 4 D. 1503.

³ 23d November, 1838, 1 D. 83.

⁴ 12th June, 1740, M. 14855.

effects, to the testator's father, and, in case of his decease, to his sister, was sustained, as importing an effectual institution. Again, in the case of Robertson *v.* Kerr,¹ in which a question arose regarding the *legitim* falling to the party, who was also institute in the testament, it was clearly taken for granted that the substitution was in itself good. The bequest there was to the only child of the testator, and the heirs of his body, whom failing, to the testator's wife. The son having survived the testator, and died, a claim was made by a brother of the testator, as heir *in mobilibus* of the child, for that part of the succession which consisted of the *legitim* supposed to be due to the child on the death of his father. The claim so limited was sustained; but if the words in the testament had not been held to import an effectual substitution, the heir *in mobilibus* must have taken the whole succession. In the case of Smith *v.* Grieve,² a bequest was made by A to his natural daughter B, and the heirs whatsoever of her body, whom failing, to C. B having been married, and died a short time after A, the truster, a competition having arisen between the husband of B, founded on the constructive assignation arising from the marriage, and C, the substitute, it was held that the husband had right, *jure mariti*, to one-half, and that C had right to the other half. The grounds upon which this conclusion was arrived at are not very intelligible from the report, but it is clearly a judgment determining the efficacy of the form of expression there employed, as creating a valid substitution in moveables. In the previous case of Brown *v.*

¹ 2d June, 1742, M. 8202.

² 27th May, 1801, M. Substit. and Condi. Instit. App. 1.

Coventry,¹ the decision was in favour of the legatee in competition with the party claiming as substitute. But there was a specialty in that case: there B, the institute in the fee of a legacy, survived A, the testator, and a liferentrix of the legacy, and, on the death of the liferentrix, C, the father of the institute, as her administrator in law, sued D, the executor, for payment, and obtained decree; but before the money was paid, B died, and C, having confirmed as her executor, raised an action against D, who pleaded the substitution contained in the deed in his favour. This specialty was of some importance, as there might be grounds for holding the decree obtained by the legatee to be equivalent to payment in a question regarding the evacuation of the substitution; and, accordingly, of the five judges whose opinions were given,² two, namely, Lord Eskgrove and Lord Monboddo, expressly founded upon that circumstance, as being equivalent to payment. In the case of *Johnston v. Greigs*,³ a conveyance was made to a daughter, under the burden of paying certain sums to two grandchildren, when they should attain the age of twenty-one years complete, and to their children, or the survivor, and, failing both without lawful issue, to the trustee's daughter, and her heirs and successors—and one of the grandchildren died in minority, and the other after majority, both without issue, and intestate,—it was held, that the fund belonged to the heir-at-law of the survivor attaining the age of twenty-one. But the judgment in this case went exclusively upon the special terms of the clause, which was held to render the right of

¹ 2d June, 1792, M. 14863, and Bell's Ca. 310, 8vo.

² Bell's Ca. *et sup.* ³ 28th June, 1831, 9 S. 806.

the daughter dependent on the death of the grandchildren without children, and during minority, and thus to amount to a conditional institution only; and, looking at the opinions given in that case, there is little reason to doubt, that, if the destination had run to the legatees and the heirs of their bodies, whom failing, to the daughter, such a destination would have been read as a substitution, and effect given to it accordingly.

In the case of Ramsay,¹ already referred to, the trustees were directed to dispone and make over a large estate, consisting both of heritage and moveables, to A, the trustor's eldest son, and the heirs whomsoever of his body, whom failing, to B, the second son, and the heirs whomsoever of his body; whom failing, to each of the younger sons, *nomina-tim* and *seriatim*, and the heirs of their respective bodies; whom failing, to any other sons yet to be born, successively, in the order of their priority of birth, and the heirs whatsoever of the body of each, respectively; whom failing, to daughters and their issue, called in similar terms. A, the eldest son, having survived his father only a few months, and died unmarried and intestate, before the trustees had made up titles to any part of the trust-estate, it was held that the second son was substitute-heir in the residue to A, and was to be preferred in competition with the younger sons claiming as next of kin and general representatives of A; it being observed, that however a destination of this kind might have been altered by the act of the substitute, or extinguished by actual payment of the legacy, the effi-

¹ 23d Nov. 1838, 1 D. 83.

ciency of the substitution, even in the case of moveables, unless so altered or extinguished, has been repeatedly recognized by the Court, and that, too, in virtue of expressions much more ambiguous than those under consideration. The circumstance of there being no direct bequest of money, but a conveyance of the whole effects, heritable and moveable, of the testator, to certain persons in trust for certain purposes, and concluding with a direction to dispone, convey, and make over the whole residue, tended, on the principles already stated, materially to distinguish this case from mere cases of legacy, such as others which have been referred to. In the case of *Duncan v. Myles*,¹ the trustor made over his whole property to trustees for his wife in life-rent, directing that a certain portion of the fee should be held by the trustees for behoof of the trustor's brother in life-rent, and of the children of his body, whom failing, for a certain substitute, and her heirs and assignees in fee. The children having survived both life-renters, who died soon thereafter, and a competition having arisen between the general representatives of those children, the institutes, and the representatives of the substitute, it was held, that the substitution was effectual, and the latter were consequently preferred. It was observed, that the legacy never vested in the children, which, in one sense, was true, as the legacy continued to be held by the trustees; but as the children survived both life-renters, the *jus crediti* under the trust, and likewise the *jus exigendi*, had vested in the children, so

¹ 27th June, 1809, F.

that the judgment in question truly decided the efficacy of such a substitution.¹

*Condition si
sine liberis.*

Where a conveyance is made for behoof of one party, whom failing, for another, the rule or principle *si sine liberis decesserit* necessarily applies, that is to say, the presumption of law is, that in the absence of express declaration on the part of the trustee, the substitute shall only succeed in the event of the institute dying without direct descendants.² Thus, where a father, by his deed of settlement, bound his trustees to divide and pay over the whole rest and residue of his estate equally, share and share alike, to his two daughters, or the survivor of them — and one daughter was at the time married, and had two children, and afterwards had another child, and predeceased her father — the children were, upon the principle *si sine liberis decesserit*, preferred to their mother's share, in competition with their aunt, the other daughter.³ So, also, in the case of *Wallace v. Wallaces*,⁴ where trustees

¹ As in questions of vesting under trust-deeds, the distinction between a conditional institution and a substitution is frequently brought under consideration, it may be proper here to observe, that a conditional institution is a destination to take effect in a certain event, as a conveyance to A, if in life at a certain period, or in an event which is certain to occur, but uncertain when it will do so ; and failing him before such event, then to B, in which case the alternative destination to B falls on the occurrence of the event in question during the life of A. A substitution is a destination to a party, "whom failing," to B, in which case the right of B, being merely postponed to that of A, is not evacuated by vesting in A, but still becomes effectual to B, failing A. This distinction may be illustrated by the case of a trust for behoof of a party or the heirs of his body, whom failing, to the trustee's lawful heirs, in which, failing the institute without heirs of his body, goes to the trustee's heir, as conditional institute ; and if the estate has vested in the party first appointed, then to the said heir as substitute ; Henderson, 12th Feb. 1841, 3 D. 548.

² See Ersk. Inst. c. 3, t. 8, s. 47, note 469.

³ Baillies, 4th June, 1822, F. ⁴ 28th Jan. 1807, M. Clause, App. 6.

were directed to pay, on the death of the longest liver of the trustor or his wife, a certain sum to the trustor's nephew, and the residue of his estate to the children of the said nephew who should be alive at that period, equally amongst them, payable on their respectively attaining the age of majority or marriage; it being farther declared, that in the event of the decease of any of the said children before such period or event, the share of each one predeceasing should fall equally among the survivors — the trustor being predeceased by his wife and nephew, and the wife having survived the nephew and his eldest son, who left a son, there being other three sons of the nephew alive at the death of the trustor's wife, — it was held, that the special sum vested in the nephew at the death of the trustor, that the son of the eldest child was entitled to one-fourth of the residue of the whole estate, and that the other three sons of the nephew were entitled equally to the other three-fourths. In this case, the fee had not necessarily vested in the father; it did so only by reason of the existence of a son, on the principle *si sine liberis*; it would not have vested in him had there not been a son, for by such a conveyance the property will not go to the heirs or assignees whatsoever of the first fieri; it will only do so where such is expressed in the deed. So, also, in the case of *Pearson v. Cassamajor*,¹ where property was conveyed in trust for behoof of certain parties, the trustor's sisters, in liferent, and the children of two of them in fee, as follows: — To pay the surplus and capital of the annuities when such capital sums should become tangible by the

¹ 16th December, 1836, 15 S. 275.

deaths of the annuitants respectively, share and share alike, and to the survivors or survivor of them, after their attaining majority or being married, or as soon as the capital should become tangible by the death of the annuitants ; and that until such several shares should become payable, the interest or dividends of each share to be payable for their maintenance ; and in the event of the deaths of any of the said fairs before the term of payment, to their issue alive at the period of payment ; it being also farther provided, that in the event of the residue at the trustee's death not required to be invested for the annuities, or for other specified purposes, amounting to a specified sum, such residue should be divided among certain legatees named. The trustee having died, being survived by two of the annuitants, and by five of the residuary legatees ; and thereafter A, one of the legatees who had attained majority, having died, leaving a testament ; and B, one of the annuitants, having died, leaving children, and having made a conveyance in favour of her husband, questions arose as to whether A's share of the residue vested in him previous to his death, and whether B's share had vested in her children, or was competently conveyed to her husband by her disposition. It was held, that the residue being appointed to be paid to the residuary legatees, share and share alike, and to the survivor of them, had not so vested in A and B, as to enable them effectually to dispose thereof; and that the children of B, who were in life at her death, were entitled, as conditional institutes, to the share appointed in the first instance to be paid to B, and to succeed, along with the other legatees alive at the death of B, to B's share of A's provision : it

being observed, that this case differs from that of Wallace essentially in this only, that here the testator had so provided for the case of a child dying before the fund was set free, but leaving issue, as to shew that in actual intention he meant precisely what in Wallace's case was presumed on a known rule of law, with the additional circumstance of a positive exclusion of the child, if not in life when the contingency emerged; that although the children of B must take, and any child of A would have taken also, it did not follow, that either on general law, or on the provisions of the deed in question, there was a vesting in them to transmit the right, independent of the *conditio si sine liberis*, or the special provision of the testator.¹ Where a sum was conveyed to a party for behoof of his son, whom failing, for the children of three families equally,—the son having died, it was held, that the sum must be divided among the children of the three families *in capita*, and not among the families collectively; that children born after the testator's death, but before the son's death, had right to a share; that the issue of those children who died before the legatee, were entitled to their parent's share; but that the heirs of those who died without issue before the son's death, had no claim.²

In a trust-disposition where there is no different interest created, and whether there is or is not a substitution over, what will amount to a contingency Contingency from special provision where no different. may arise from a provision contained in the deed. Thus, a contingency may arise from the appointment of a special duty to be performed by the trustee,

¹ *Ibid.* per Lord Moncrieff.

² M'Kenzie, 2d Feb. 1781, M. 6602.

indicating a trust of endurance. Where trustees were directed to divide the residue of the trustor's succession in a certain manner, as soon after his death as might be thought prudent and expedient—and that the trustees should bring the estate into such a position as to enable them to make a general division, as by converting the estate into cash or otherwise—and that if any of the beneficiaries should predecease the trustor or the period of division without issue, then that their shares should revert to the general fund,—it was held, that the share of a party predeceasing the period of division specified in the trust-deed had not vested in him.¹ Where the residue of a trust-estate, after payment of debts and legacies, was directed to be converted into money, and paid over in six equal parts; in particular, to the child or children of a certain party, the trustor's nephew, one-sixth share—and failing any of them, by decease before their marriage or majority, the share of the child or children so predeceasing should fall and accresce to the survivor or survivors in equal portions—and part of the trust-provisions indicated that a trust of some duration was contemplated,—two of the children having concurred in claiming payment of this sixth share, both being in minority and unmarried, it was held, that the capital sum of the provision was not exigible by the children prior to their majority or marriage.² So, also, where property was conveyed under trust for behoof of the sisters and their heirs, in the event that after due advertisements for them, they should claim within five years from his

¹ Thorburn, 16th Feb. 1836, 14 S. 485.

² Campbell, 12th June, 1840, 2 D. 1084.

death ; failing which, to certain other persons — and the eventual right of these persons was thereafter restricted to a liferent, with the exception of one of them, to whom the fee was given — and no claim had been made by the sisters or their heirs, one of the liferenters having died within the currency of the five years, — it was held, that the right did not vest in these eventual legatees till after the expiration of the five years ; that the interest arising during their currency must be added to the capital sum ; that the right of the party dying in the meanwhile lapsed ; and that the fiar was entitled to payment of the share of the fund corresponding to the share of each deceasing liferenter on the death of each of them taking place.¹

The effect of a conveyance to trustees, as regards <sup>Liferent and
fee.</sup> the rights of the beneficiaries, appears very clearly in the case of a conveyance to a party in liferent, and his children *nascituris* in fee. If a conveyance be made to a party in liferent, and his children *nascituris* in fee, the fee vests in the parent, unless the term liferent *allenarly* be used. But if the conveyance be to trustees, for behoof of a certain party in liferent, and his children *nascituris* in fee, the parent has a mere liferent, because, being vested in the trustees, no question arises as to the fee being *in pendente*.

The most common case of contingent interest under a trust, is, where a liferent interest is created in one party, and the fee in another. Thus, where a testator left one son and two daughters, and the son being insolvent, the testator conveyed his whole

¹ Stevenson, 30th June, 1826, 4 S. 776. See also Johnston, *snp.* page 357.

estate, both heritable and moveable, to trustees, directing them to pay an alimentary annuity to the son ; and the conveyance contained a clause, excepting always the liferent use and possession of a house, which he conveyed to the son in liferent, under certain conditions, along with the household furniture, which, at the son's death, without lawful issue, were to belong to the trustor's daughters equally in fee,—the son having no issue up to the period when one of his creditors used diligence for attaching the furniture, a bill of suspension and interdict was passed, in respect that the fee of the furniture was not in the son, but in the trustees.¹

If the conveyance be, failing the liferenter, then the fee to another party unconditionally, *quoad* the fiar's succession, the fee vests in him at once, the liferent being a mere burden on it. A direction to the trustees, failing the liferenter, to pay the fee to the party appointed, will not infer that it was necessarily to be postponed till that time. Thus, where a testator conveyed his whole estate, heritable and moveable, to trustees, who were directed to pay the free annual proceeds of it to his three unmarried sisters and the survivor, and, after their death, to pay to six nephews and nieces of the trustor, *nominationem*, or to the children of those predeceasing that period, certain specified sums, to bear interest from the death of the last surviving liferentrix—and one of the legatees survived the testator and two of his sisters, but predeceased the third sister, and left no issue,—it was held, that the legacy had vested in him on the death of the testator, and was effectually

¹ Scott, 13th May, 1837, 15 S. 916.

assignable by him during his life, or attachable by his executor creditor after his death.¹ Where a sum was conveyed to trustees, to pay the interest to the trustor's daughter in liferent, and, at her death, the fee to the whole of her children, share and share alike, and the children all died in minority, predeceasing their mother, it was held, that the fee had vested in them, and was carried by their settlements, though the term of payment was postponed until after the death of the testator's daughter, and the grandchildren predeceased that period.²

Where a conveyance was for payment of an annuity to the trustor's son, and a sum in fee to the liferenter's children, if arrived at majority, after his death, or the majority of the youngest of the children, in case of the liferenter's death before that period, and, failing any of them by death without lawful children, their shares to the survivor—the liferenter having survived the trustor, but died before the majority of the youngest child,—it was held, that the provisions had vested at the death of the father, from which time interest became payable, as the period of vesting, but not of payment, had arrived.³ Where a party conveyed a certain sum to trustees, with directions that they should set it apart, and apply the yearly interest as an annuity to A during his life, and that, on his death, they should divide and apply it in a certain manner, paying a certain portion of the sums to B, and the remainder to certain other parties, and their respective heirs, in case of their death, it was held, that B's share

¹ Maxwell, 25th May, 1837, 15 S. 1005.

² Forbes, 26th January, 1838, 16 S. 374.

³ Kennedy, 20th July, 1841, 3 D. 1266.

had vested on the testator's death, and was not suspended till the death of A.¹ But a provision in favour of a party in fee, whom failing, to his heirs, will not amount to such a destination over as to prevent the fee from vesting in the first fier, *a morte testatoris*; for the legal maxim, *haeres est eadem persona cum defuncto*, applies to such a case.²

Liferent, fee,
and destina-
tion over.

In the case of Thomson v. Reid,³ where property was conveyed to trustees, for the purpose of paying the rents to a certain party, as a liferent annuity,—and it was directed, that, on the death of the annuitant, the heritage should be sold, and the money arising from the sale distributed among the whole of the children of the trustor's sisters, whom failing, to their descendants, and that in such shares and proportions as should be judged proper by the trustees, or survivor of them, according to circumstances—and that, in the event of his sisters' children or their descendants being all dead at that time, the said funds should be applied to certain charitable purposes,—and, upon the death of the liferenter and the sale of the property, the trustees refused to exercise the discretionary power of distribution,—it was held, that it was the intention of the trustor to call the descendants of the sisters' children along with the sisters' children, that the descendants were conditional institutes along with the parents, and that the descendants of such nephews and nieces as were alive at the date of the will were

¹ Marchbanks, 18th Feb. 1836, 14 S. 521. See, however, Ralston, 8th July, 1842, 4 D. 1499, per Lord J. C. Hope. See, also, Mirrieles, 17th May, 1826, 4 S. 591, and *inf.* page 379.

² See Johnston, 9th June, 1840, 2 D. 1041, per Lord Moncreiff; and Marchbanks, *ut sup.*

³ 16th Nov. 1814, F.

entitled to draw their shares, *per stirpes*, with the immediate progeny of sisters. And in the case of Leitch *v.* Leitch's trustees,¹ where lands were conveyed to trustees, to hold them in trust for his widow in liferent, during her life and viduity, and, on her death or second marriage, for behoof of a certain party, and his heirs and assignees whomsoever, in fee, in case the said party should survive the trustor, and be in life at the time of the death or second marriage of the liferentrix; whom failing before either of such periods, for another party in similar terms; whom failing, in like manner for another party, but without calling his heirs or assigns; whom failing, (but without saying at the death or marriage of the liferentrix,) for behoof of certain parties equally, and their heirs and assignees — the first two fairs having predeceased the liferentrix, who did not marry a second time, and the third fair having executed a general disposition, and also predeceased the liferentrix — it was held, that the fee had vested in the third fair, and that the general disposition by him was effectual to evacuate the subsequent destinations.

But where a property was disposed in trust to a party in liferent, and her children in fee, but it was provided, that, in the event of her death without lawful issue, the money should return to, and form part of, the residue of the trust-estate — and the liferentrix had a son who predeceased her, leaving two children, — on her death, the children of the son were held to be preferable to his creditors, as, in virtue of the ulterior purpose, no right ever vested in him;

¹ 2d June, 1826, 4 S. 659, Aff. 3, W. S. 366.

and he could never have demanded payment, unless he had survived the liferentrix.¹ Where a bond of provision was made payable to trustees, for behoof of the trustor's daughter in liferent, for her liferent use only, and in fee to the child or children of her body equally, if more than one; whom failing, to his own heirs, at the first term after his death; and the daughter had then four children, and died predeceased by three sons, and survived by a daughter, the pursuer, the issue of one of the sons being defenders, the questions being, Whether the provision vested in the children of the daughter during her lifetime? and whether, if it did, being a moveable succession, the shares of the predeceasing children went to the executors, and so to the pursuer equally with the father of the defenders? — it was held, (by Lord Mackenzie, and affirmed by the Court,) 1st, That the subject was heritable; 2d, That the design was to provide for the daughter, and the children she should leave behind her; 3d, That, conveying the *jus crediti* accordingly to trustees, it was to be held for the daughter during her life, but for her in liferent, and the child or children of her body equally, if more than one, and who they were could be known only at her death; and that the heirs of the children (who might not be heirs to each other in the case of a second marriage) were excluded by the destination to his own heirs.² Where a testator conveyed his property to trustees, to be held in part for a married daughter, for her liferent use alienarily, and in fee for her children, and, failing her children, for her other heirs and assignees whatsoever—and she had

¹ Glendinning, 30th Nov. 1825, 4 S. 237.

² Clavering, 12th Nov. 1833; fully stated in Thomson, 2 S. and M. 320.

four children, who all predeceased her, two of them only having issue, and two having assigned their interest to their husbands,—it was held, on the death of the liferentrix, that no right of fee had previously vested in any of the children, so as to be transmissible by them, in respect that the provision to the heirs and assignees of the liferenter, failing the children of the liferenters and their issue, clearly shewed the trust was to continue, and, therefore, the vesting being suspended till the death of the liferenter, there being a clear distinction between a grant to children, and a grant to them, their heirs, and assignees, in such a question as this.¹ Where a testator directed, that, in the event of his children dying in minority and unmarried, his trustees should pay the interest of the trust-fund to his wife, if surviving him, for her aliment during her life, and, upon her death, the fee to his assignees or legatees; whom failing, to A, his brother, and his lawful issue; whom failing, to B, his brother, and his sisters, equally betwixt them, their heirs, and assignees; and the trustor died without executing any other settlement, and his only child survived him, but died an unmarried minor, the trustor being survived by his wife and brothers, A and B, and his sister — it was held, that the fee did not vest before the term of payment, and had not vested in A during the existence of the liferent interest.² In this case, the trustees were to pay the liferent interest annually, and the fee on her death. The free transmission of the fee being thus almost expressly postponed, the

¹ Mowbray, 9th July, 1834, 12 S. 910; Aff. 2 S. and M. 305; see also Dick, 4th July, 1828, 6 S. 1065.

² Wright, 9th July, 1840, 2 D. 1357.

circumstance that the term of vesting of the fee must arrive, could not affect it, as it was uncertain that it would do so during the lifetime of the party first mentioned to take the fee. There were no words tending to vest the fee in that party, whilst, on the other hand, there was an enduring trust for stated purposes, for which purposes the fee was in the trustees.

Substantially, the view taken by the majority of the Judges in the Court of Session, in the case of Leitch,¹ was, that where there is a trust-conveyance of a liferent to one party, and fee to another or others, without any special condition expressed in the deed, the fee must be in some one, although it could not be exercised during that period, and that the feudal investiture by the trustees could only vest a fiduciary fee in them—not the actual fee, which, therefore, could only be in the fiar, and must give to him the same right as if it were held by the trustees for his immediate behoof. The case of Thomson² is somewhat similar, but not so strong, by any means, as an authority, for there was in it a special duty to be performed by the trustees, namely, to sell the property, and divide the estate amongst a class who were clearly substitutes, and not mere conditional institutes, as held by the Court. In these circumstances, and as the terms of the judgment of the House of Lords rests generally upon the intention of the trustor, as implied from the terms of the deed, as shewing an exception in regard to the special party in question; and, moreover, as it does not appear to have been observed, that the circumstance of the

¹ *Ut sup.* page 369.

² *Ut sup.* page 368.

conveyance to the party in question not being to him, his heirs, and successors, was strictly a much stronger circumstance, as shewing that the ulterior interests were intended to take effect, than the circumstance of the special period of time, namely, the death or marriage of the liferentrix, being omitted in that case,—that is, if any inference was to be drawn from these omissions,—this question may, indeed, be held as conclusively determined by subsequent and recent cases. In the case of *Mowbray v. Scougals*, already referred to,³ considerable doubt was at first expressed as to whether the case of *Leitch* did not form a conclusive precedent as regards this question; but the view ultimately taken of the case in question must undoubtedly be held as determining, that the conveyance of property for behoof of a series of parties consecutively, where the actual beneficidie interest—that is, the *jus exigendi*—is suspended until the occurrence of a specified event, as the termination of a liferent, the entire fee is vested in the trustee, to the exclusion of a right vesting, which shall be effectual to alter the order of succession from that indicated by the trustor. Such a conveyance is subject to the restrictions pointed out by law, as the *conditio si sine liberis*; but it must be observed, that, as regards interpretation of matter of intention, as indicated by the deed, vesting, to the effect of fixing or altering a line of succession, is quite distinct from the existence of the right, for example, to pursue for implement of the conditions of the trust, against the trustee, which requires an interest merely, and therefore is compe-

³ *Sup.* page 371.

tent to all substitutes, or others interested under the deed; whereas, in such a case or question as that under consideration, there is a declaration of intention, namely, the appointment of a series of parties who are to take in succession, after the occurrence of a certain event. It is not enough to say, that the interest of an institute is certain to take effect on a certain event, as the expiry of the liferent, for, until that period, a *spes successionis* exists in all equally; and as it cannot be ascertained until that period who will succeed, the specification of the period of time must necessarily amount to the declaration of a condition, a circumstance which necessarily infers entire investiture in the trustee, and consequent suspending of vesting, as regards ulterior interests. Thus, where it was directed that the free produce of an estate should be invested by the trustees, as a capital sum, on heritable security, for the benefit of the trustor's heirs, and that the interest thereof should be payable, one-half as an annuity, to certain ladies, and one-half to a grandnephew, and, on the annuity being terminated, the whole capital to be paid to the grandnephew, and the heirs of his body, whom failing, to certain others specially named,—it was held, that the grandnephew was not entitled to claim payment of one-half of the principal sum during the subsistence of the annuity in favour of the ladies.¹

Where a party conveyed certain property to trustees for behoof of his daughters in liferent, and their children in fee, declaring, that, in case any of them should decease without issue, their provisions

¹ Grieve's Trustees, 9th June, 1830, 8 S. 896.

should belong and be divided equally to and among the surviving sisters, and their heirs and assigns, it was held, that the provision as to the succession of surviving daughters, and the heirs of such survivors, to the provision of any of the daughters who might die without issue, was not to be understood as applying only to the case of any of them predeceasing the trustor, but as applicable to the case of any of them dying without children, *quando cunque*, and that a conditional institution was created in the survivors and their heirs, whereby there could be no vesting of the fee of any of the provisions in the beneficiaries, nor any power in them to affect the succession to the fee, by deeds either *mortis causa* or *inter vivos*.¹ Where trustees were directed to sell the trustor's whole property, and pay the interest to the trustor's widow in liferent, and, after her death, to invest the capital for the purpose of paying the interest of one-half of the funds as an annuity to the trustor's niece; whom failing, to certain other nieces; whom failing, to become part of the common stock, and to pay the interest of the other half in like manner, as soon as invested, to a certain grand-nephew in liferent, the liferent of the half for behoof of the nieces to accresce to the grand-nephew's liferent, the fee of the whole being thereafter directed to be appropriated to the said grand-nephew and the heirs of his body; whom failing, to his father and uncle, the trustor's nephews, equally, and the heirs of their bodies respectively; and, "failing all of them," to a certain party, not a relative of the trustor—the grandnephew having died unmarried, and before the niece first mentioned, the other liferenters being

¹ Dennistoun, 22d Nov. 1838, 1 D. 69.

dead, and the nephew having died, the latter unmarried,— it was held, that the daughter and only child of the elder nephew, (the sister of the institute,) was to be preferred to the party named to take, failing all the others.¹

Express contingency, life-rent, with destination over.

Where there is an express contingency, there can be no vesting until that contingency be purified. Thus, when trustees were directed to pay the rents of certain property to A during his life, and to convey the property to him and the heirs of his body, in the event of his marrying and having children ; but that in the event of his not marrying, and not having children, to convey to B, and his heirs and assignees whatsoever — and B predeceased A without issue — and A afterwards died without having been married,—it was held, in a competition between the heir of line and the heir of conquest of B, that no right had vested in B prior to his death, and that the heir was the party entitled to succeed.²

Where a husband and wife, by a trust-deed, disposed their estates and effects to themselves jointly, for their joint and several liferents alienarily, and to the trustees in fee, declaring the settlement irrevocable at the death of either of them—and bequeathed certain legacies, declaring, that in the event of the death of any of the legatees prior to the survivor of the trustees, they should thereby fall and belong to their executors or next of kin — and a legatee survived one of the testators, but predeceased the other,— it was held, that the legacy belonged to the legatee's nearest of kin, as conditional institutes.³

¹ Bell, 22d May, 1840, 2 D. 880.

² Miller, 19th January, 1831, 9 S. 295.

³ Lawson, 24th Jan. 1826, 4 S. 384 ; Aff. 2 W. S. 625.

Where a disposition was made to trustees for behoof of a party and her husband, or the longest liver of them in liferent for their liferent use allenarly, and on the death of the longest liver, the fee to a niece of the truster, *nominatim*, in the event of there being no other lawful children of the truster's other daughters then in life; but that in the event of there being such issue, the property should be equally divided betwixt them and the said party named; and that, failing the said party and her issue, it should be conveyed in a certain manner to other parties mentioned,—it was held, that the fee of the legacy was not intended to vest till the death of the liferenters.¹ And where a party's whole estate was conveyed for certain purposes, with directions to the trustee to accumulate the residue during the lives of two sisters who were to receive certain annuities out of it, and for six months after the death of the longest liver, after which, and after having set apart a sum to a particular party, the residue to be divided among the truster's nephews and nieces, and two grand-nieces, it being declared, that the shares of the nephews and nieces should be lent out on heritable security, the interest whereof to be taken payable to them in liferent, for their liferent use of the interest thereof, and to the children of their bodies in fee; and in case of the death of any of them without children, then the share of the predeceaser to go to the survivors; it being also declared, that the interest of the shares falling to his nieces and grandnieces should be taken payable to them, exclusive of the *jus mariti*,

¹ Buchanan, 12th Feb. 1830, 8 S. 516.

and not to be affected by the diligence of creditors,— it was held, that the share of one of the grandnieces, who had survived the testator, but died before the period of distribution, had not vested in her ; that the other grandniece was not restricted to a liferent of the share of the residue given to her, and that the fee vested in her, and not in her children ; that the right to the fee of their shares vested in the children of the nephews and nieces at the period of division, subject to the liferent of their parents.¹ Here there was both an express contingency and a duty to be performed, clearly shewing a trust of continuance.

*Express con-
tingency, life-
rent, without
destination
over.*

In the case of Provan *v.* Provan,² where a sum was directed to be laid out by trustees, and the interest applied in the payment of a certain annuity, and after the death of the annuitant, the trustees were to uplift and divide the principal sum among the children of the annuitant, and the heirs of those children predeceasing the annuitant,— it was held, that the provision of the principal sum did not vest in the children until the death of the annuitant. In accordance with which, in the case of Johnston *v.* Johnston,³ where trustees were appointed to pay a certain annuity to the trustor's sister and her husband, and the longest liver of them, and, six months subsequent to the death of the longest liver, to pay a certain sum equally among their children, excluding the *jus mariti* ; it being also provided, that in case any of their children should predecease their parents, leaving children behind them, the respective shares of those predeceasing were to be equally divided among such children,— it was held, that the

¹ Robertson, 6th June, 1843, 5 D. 1117. ² 14th Jan. 1840, 2 D. 298.

³ 9th June, 1840, 2 D. 1038.

legacy in favour of the children did not vest till the death of the longest liver of the annuitants ; and that it fell to be divided equally, *per stirpes*, among the children surviving, and the issue of those who had predeceased.

In these last-mentioned cases, it was held by the Lord Ordinary, (Lord Moncrieff,) that as there was no ulterior destination, the fee did vest in the fiar on the death of the truster, although the term of payment was postponed. And although it was held by the Court, that from the special intention of the truster, as indicated by the deed, the trustees had not intended, in these cases, that any right to the fee should vest till the expiry of the respective liferents, still it is not to be supposed that these cases are inconsistent with the rule already stated, that in a conveyance to trustees for behoof of one party in liferent, and of another in fee, the fee vests in the beneficiary from the death of the truster, the liferent being a mere burden on the fiar's right ; although the property be vested in the trustees, it is so for the purpose of securing the liferent, and not with a view to any mere presumable contingent interest in the fee. Such contingent interest, to have effect, must either be expressly declared by the deed, or necessarily inferred from it.¹

Where the truster directs payment to be made during the subsistence of a liferent, there can be no room for a presumption as to the time of vesting ; there is no contingency dependent upon that event, for such is specially excluded, and the right vests

¹ See, however, Ralston, 8th July, 1842, 4 D. 1496.

independent of it.¹ Thus, where a father conveyed his property, heritable and moveable, with power to sell, for the purposes of paying certain annuities and legacies, and paying the residue, subject to the annuities, equally between his two sons and the survivor of them, in the event of either of them predeceasing the other without being lawfully married, and, failing them both before marriage, to his daughters—and both sons survived the father, but one predeceased the other, leaving a general will,—it was held, that an equal part of the whole residue vested in each of the sons, *morte testatoris*, so as to be carried by the will of the predeceasing son to the evacuation of the substitution in favour of the other.²

Purifying of
condition by
appropriation
of funds by
beneficiary.

With regard to the identification of funds, as finally uplifted and appropriated by a beneficiary, where a sum was made payable to a party on attaining the age of twenty-one years complete, failing which, or in the event of his surviving that term,—then failing his disposing the sum,—that the trustees should accumulate the trust-fund for behoof of grandchildren—and the trustees did not accept, and the beneficiary survived the term, and uplifted the fund, and died intestate—it was held, that it belonged to his executors, and not to his grandchildren.³ Where a testator directed that his trustees should, at the expiry of fourteen years from his decease, dispose of certain lands,² and divide the proceeds

¹ See Scheniman, 25th June, 1828, 6 S. 1019; Shaw, 6 S. 1149; Bruce, 28th June, 1833, 11 S. 799.

² Ramsey, 26th June, 1833, 11 S. 786.

³ Johnston, 28th June, 1831, 9 S. 806.

among his surviving children, the shares of those predeceasing without issue accrescing to the survivors equally; it being provided, also, that the shares falling to each should not be liable to be affected by their debts or deeds while in the hands of the trustees, and should only be liable to such contingencies after the same should be actually paid over and discharged; and, shortly after expiry of the term, three sons and three daughters of the testator then surviving, the trustees, with consent of the sons, entered into a minute of sale, whereby they bound themselves, on payment of the price, to dispone the lands to the daughters, the entry being at Martinmas following, and, some days thereafter, one of the sons died, having, previous to the date of the minute, dispossed his right of succession to his sisters,—it was held, that the share of the price or value of the lands escheiring to the deceased, had not vested in him at the date of his death, so as to be carried by the disposition to his sisters, but accresced equally to them and their two brothers.¹

A bequest to children named, subject to a power of division, failing the execution of the power, vests as at the period of the testator's death.² Where trustees were directed to pay the proceeds of a fund to A, as an alimentary annuity, and the fund itself, after his death, to any person to whom he might leave and bequeath it, and, failing such nomination, to his heirs-at-law, and A, after executing a will, predeceased the testator,—it was held, that the fund belonged not to the heir instituted by A, but to his heirs-at-law; for the funds had neither vested

Effect of a power of division.

¹ Wilkie, 27th Jan. 1837, 15 S. 431; see also *sup.* page 358.

² Sivwright, 27th Jan. 1824, 2 S. 643.

in the donee of the power, nor in the trustees for his behoof.¹

SECTION III.—TRUSTS BY OPERATION OF LAW, REVERSIONARY INTERESTS, &c.

Right to surplus,
heirs-at-
law.

IN trust-deeds, as in the case of all other dispositions of property, unless so specially declared by the terms of the deed, the natural order of succession, as regards the trustee's property generally, remains unaltered; and, therefore, if there be any surplus over and above what is conveyed by it, such will belong to the trustee's heirs-at-law. So, also, if there eventually come to be a surplus, after the trust-purposes shall have been fulfilled, such surplus, whether arising termly during the subsistence of the trust, or, more generally, at its termination, if the terms of the trust-deed be not so general as to include the whole residue, of whatever kind, will, by resulting trust, belong to the heir-at-law, there being a right in the heir of the trustee, as well as in those directly interested under the trust, to enforce the proper performance of the purposes of the trust and application of the funds;² for every right inherent in the trustee, other than such as are reserved to himself personally by the terms of the deed, in the nature of a liferent reservation or interest, will pass to his heirs, which is a right independent of any intention not expressly contained in the deed; for

¹ Henry, 19th Feb. 1824, 2 S. 725.

² M'Leish's Trustees, 25th May, 1841, 3 D. 914; Christie, 6th July, 1774, M. 5755; Hill, 14th April, 1826, 2 W. S. 91.

all acts amounting to disinherison are strictly interpreted as against the interest created by the deed.¹ So, also, in regard to reversionary interests under the deed ; the trustee is no less bound to attend to ^{Reversionary interests under deed.}

¹ The heir is a person highly favoured in the law of England ; he is not excluded from a resulting trust on bare conjecture ; *Halliday v. Hudson*, 3 Ves. 211, per Lord Loughborough ; see also *Kellett v. Kellett*, 3 Dow, 248 ; *Amphlett v. Parke*, 2 R. and M. 227 ; *Phillips v. Phillips*, 1 M. and K. 661. And there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that no benefit was intended to the heir ; for the trust results to the real representative, not on the ground of intention, but because the ancestor has declared no intention ; see *Hopkins v. Hopkins*, Cas. t. Talb. 44 ; *Tregonwell v. Sydenham*, 3 Dow, 211 ; *Lloyd v. Spillet*, 2 Atk. 151 ; *Habergham v. Viencent*, 2 Ves. jun. 225. Thus, a legacy to the heir will not prevent a trust from resulting ; *Randall v. Bookey*, 2 Vern. 425, S. C. Pr. Ch. 162 ; *Hopkins, ut sup.* ; *Starkey v. Brooks*, 1 P. W. 390, overruling *North v. Crompton*, 1 Ch. Ca. 196 ; but, joined to other circumstances in favour of the devisee, it will not be wholly ineffectual ; *Rogers v. Rogers*, 3 P. W. 198, S. C. Sel. Ch. Ca. 81 ; see, also, *Docksey v. Docksey*, 3 Eq. Ca. ab. 506 ; *King v. Denison*, 1 V. and B. 274 ; *Amphlett v. Parke*, 2 R. and M. 230 ; *Mallabar v. Mallabar*, Cas. t. talb. 78. It may be observed, that the term *resulting trust* includes rights both resulting to heirs and to others ; for in England, the heir, although favoured, is not a party of the same importance as in Scotland, where, in consequence of strict technical forms, and otherwise, his right cannot be taken away, unless by positive conveyance. So that, strictly speaking, the right arising to the heir otherwise than by express declaration in the trust-deed, is not a resulting trust arising under the deed, but, as stated above, a right existing independently of it, whether that interest arises as a general limitation of the trust-right, or termly, in the nature of a residuary interest ; the term *emerging trust*, as frequently used in our law, that is, where a trust has not existed *ab origine*, but has subsequently emerged as a necessary consequence, or by legal interpretation, and *resulting trusts* in the English law, are more similar ; see opinion of Lord Glenlee, in *Macfarlane*, 23d May, 1837, 15 S. 978. In England, accordingly, this resulting interest may be rebutted by positive evidence, by parole, that the testator's intention was to confer the surplus interest beneficially ; *Crompton v. North*, as cited *Gainsborough v. Gainsborough*, 2 Ver. 253 ; *Docksey, ut sup.* ; *Mallabar, ut sup.* ; *Cook v. Hutchinson*, 1 Keene, 50, per Lord Langdale. But such interpretation or qualification of a deed by parole, could not, of course, be sustained in Scotland. And in England, where a trust results to the settlor or his representative, not by presumption of law, but by force of the written instrument, the trustee is of course not at liberty to defeat the resulting trust by the production of extrinsic evidence by parole ; see *Langham v. Sanford*, 17 Ves. 442, S. C. 19, Ves. 643 ; *Rachfield v. Careless*, 2 P. W. 158 ; *Gladding v. Yapp*, 5 Mad. 59 ; *White v. Evans*, 4 Ves. 21 ; *Walton v. Walton*, 14 Ves. 322 ; see L. on T. 134, 135 ; and *sup. pp. 12, 29, 30.*

the interests of the party having a right of reversion, than to other and primary interests;¹ for the reversionary interest is as much a declared interest as any under the deed. Such reversionary interests, of course, vary considerably,—as, being reversionary interests of a trust-conveyance, *omnium bonorum*, or of a special sum or subject where the conveyance is a limited one. In the former case, where it is to the trustee's heir, it simply amounts to a reservation of the rights of that heir, otherwise than as affected by the primary purposes of the trust. If to a party not a natural heir, it amounts to the declaration of a specific interest. Such interests are contingent, but arising or vesting simultaneously with the primary trust-purposes, but subject, as regards the beneficial interest thereby conferred, to the fulfilment of these purposes. Nor does the exclusion of an heir, in one character, necessarily exclude him in another. Thus, where a party, by his trust-deed of settlement in words, disinherited his eldest son, and conveyed his property to trustees, to hold for his second son till he should attain a certain age; and, in the event of his dying before that period, for his issue, or the issue of the trustee's eldest son; and, failing such issue, for the trustee's heirs and assignees whatsoever—and the second son died without issue before attaining twenty-five—and the eldest son, having no children, expedite a service as nearest heir of his father, and brought an action against the trustees, concluding to have them ordained to denude in his favour, as the nearest heir of the testator—it was held, that the disinheriting words could not preclude

Partial ex-
clusion of
heir.

¹ See *sup.* part 2, c. 5; part 2, c. 7.

his taking as his father's nearest of kin, when the succession opened to that class; but that it was only on the absolute failure of issue of the two sons that that destination took effect, and not on the event of none such being in existence at the period of the death of the youngest son; and that, while the eldest son might have issue of his body, the trustees could not be called on to denude absolutely in his favour;¹ but, as already mentioned, he was allowed to receive the rents, on caution to repeat in the event of issue.² Thus the party was excluded as eldest son, but yet was not excluded as heir whatsoever of the trustee.

A trust of the kind now alluded to arises in the case of a party, who is a beneficiary under a trust-deed, being presumed, though not proved, to be dead, as a contingent beneficiary interest exists in the heirs, who have a right to enforce the fulfilment of the trust.³ So, also, the right of *legitim* will not be defeated by a gratuitous *mortis causa* trust-conveyance.⁴

The rights and interests of heirs and successors, as affected by mortifications in trusts, are in no degree different from trusts for other purposes; for if the powers of the trustees are so limited as to prevent the permanent continuance of the trust, a time may come, when, by the expiry of it, this burden on the title of the trustee's heir-at-law may

¹ Blackwood, 26th Feb. 1833, 11 S. 443.

² S. C. 11th June, 1833, 11 S. 699. See *inf.* chap. 9, and *swp.* page 208.

³ See Campbell, 17th June, 1824, 3 S. 145; Fettes, 7th July, 1825, 4 S. 149; Hyalop, 15th June, 1830, 8 S. 919; Bruce, 25th February, 1834, 12 S. 486.

⁴ Nicolson's Assignees, 2d March, 1841, 3 D. 675.

be extinguished, and his right of succession revive.¹ Or if the nature of the trust-purposes, and the state of the property be such, that any part of the trust-funds, not consisting merely of a surplus portion of funds distinctly applied to fixed trust-purposes, stand legally undisposed of, there may then be a resulting trust in the trustees for the heir-at-law to that extent. And this will be the case although it should be clear that it was not contemplated by the testator, for intention may enter deeply into questions as to powers, and still more so in regard to the extent or nature of the purposes of trusts; but if it shall be settled that the powers are so radically defective, that in certain events the only trust constituted must terminate; or that, after answering all the trust-purposes provided, there are or may be funds, though in the hands of the trustees, undisposed of, or which cannot be legitimately applied by them under the terms of the trust-deed; in either of these cases the right of the heir emerges, and cannot be defeated by any belief that the testator did not intend such a result, or might have preferred a different manner of disposal not provided.² Nor are the cases of Heriot's Hospital³ and Moor's Mortification⁴ opposed to this, for in these the conveyances were ample as regards the subject conveyed, viz. funds which were to be laid out by the trustees in the purchase of lands, the trustees of course being the judges of the best mode of doing so. If there

¹ See Soutar, 22d Jan. 1801, M. Implied Will, App. 2; Hospital of Perth, 20th May, 1795, as reported in Bell's Ca. 173, fol.

² M'Leish's Trustees, 25th May, 1841, 8 D. 914.

³ 9th August, 1765, M. 5750; and see p. 159.

⁴ 25th June, 1814, F.; and see p. 159.

had in these cases been any competing right, it must have been ulterior to that altogether.

The English law makes this important distinction, that settlements to charitable purposes are an exception from the law of resulting trusts; for upon the construction of instruments of this kind the Court has adopted the two following rules, as stated by Mr Lewin,¹— 1. Where a person makes a gift, whether by deed or will, and expresses a general intention of charity, but either particularizes no objects,² or such as do not exhaust the proceeds,³ the Court will not suffer the property in the first case, or the surplus in the second, to result to the settler or his representatives, but will take upon itself to execute the general intention, by declaring the particular purposes to which the funds shall be applied. 2. Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but in consequence of an increase in the value of the estate, an excess of income subsequently arises, the Court will order the surplus, instead of resulting to the heir, to be applied in the same or a similar manner with the original amount.⁴ This distinction arises from the

Distinction as
to charitable
trusts in Eng-
land.

¹ Law of Trusts, 149.

² Attorney-General v. Herrick, Amb. 712.

³ Attorney-General v. Haberdasher's Company, 4 B. C. C. 102, S. C. 2 Ves. Jun. 1; Attorney-General v. Minshull, 4 Ves. 11; Attorney-General v. Arnold, Shower's P. C. 22; and see Attorney-General v. Sparks, Amb. 201; and observations by Lord Eldon in Attorney-General v. Mayor of Bristol, 2 J. and W. 319.

⁴ Inhabitants of Eltham v. Warreyn, Duke, 67; Sutton Colefield Case, second resolution, Id. 68; Hynshaw v. Morpeth Corporation, Id. 69; Thetford School case, 8 Re. 130, b; Attorney-General v. Johnson, Amb. 190; Kensington Hastings' case, Duke, 71; Attorney-General v. Mayor of Coventry, 2 Vern. 397, reversed in D. P. 7 B. P. C. 236; Observations by

prevailing tendency which has ever been observed in the English law, to support such trusts. The law of Scotland, although tending, though in a comparatively slight degree, to support or favour such trusts, has never, with that object, gone the length of recognizing in any court of justice such very extraordinary powers as these. And so, as observed by Mr Lewin,¹ these exceptions "were established in the English law at an early period, when the doctrine of resulting trusts was imperfectly understood.² The interest of the heir was shut entirely out of sight, and the question was viewed as between the charity and the trustee.³ Were the subject still unprejudiced by authority, there is little doubt but the Court would at the present day be governed by the general principle, and hold a trust to result."⁴ The only competent course with a view to the modification of mortifications, is by recourse to Parliament, whereby the application has been frequently changed. But the legislature will pause ere it interfere to affect the disposal of property by its application to purposes other than those appointed by the original owner, at least when private interests may be taken away or affected; for the mere conveyance of

Lord Eldon in *Attorney-General v. Mayor of Bristol*, 2 J. and W. 316; *Attorney-General v. Cooper's Company*, 19 Vea. 189, per Lord Eldon; *Attorney-General v. Wilson*, 3 M. and K. 362; *Lad v. London City*, Mo. 99; *Attorney-General v. Cooper's Company*, 3 Beav. 29; *Attorney-General v. Master of Cathrine Hall, Cambridge*, Jac. 381; *Attorney-General v. Draper's Company*, 2 Beav. 508; *Attorney-General v. Caius College*, 2 Keene, 150; and see *Attorney-General v. Smythies*, 2 R. and M. 717.

¹ *Law of Trusts*, 150.

² *Attorney-General v. Johnson*, Amb. 190, per Lord Hardwicke; *Attorney-General v. Mayor of Bristol*, 2 J. and W. 307, per Lord Eldon.

³ See *Thetford School case*, 8 Re. 130.

⁴ See *Attorney-General v. Mayor of Bristol*, 2 J. and W. 307.

property to be mortified to a special purpose, does not necessarily exclude the actual or possible existence of a right in heirs-at-law.¹

¹ It may here be observed, that it is very generally asserted, that testametary deeds are to be favourably construed, more especially in reference to charitable bequests. It is difficult to see a good reason in law or equitable principle, why a distinction should be made in favour of such bequests—it is supported by no sound principle in law; and it is more than doubtful whether, looking at the increase of private charities, such as hospitals, or to the motives and circumstances in which they but too frequently have their origin, such bequests ought, as a general rule, to be specially favoured.

CHAPTER III.

APPLICATION OF RENTS, INTERESTS, AND OTHER
INTERMEDIATE ACCUMULATIONS.

Interest. WHERE no provision is made in a trust-deed with respect to the interest of a sum, it is accumulated with the principal.¹ Thus, where a bonus is declared upon bank stock in the hands of trustees, the bonus will accresce to the fair of the principal stock on which it has been declared.² So, therefore, where a party conveyed his estates to trustees for behoof of a contingent heir, whom failing, to other substitutes, with a general assignation of rents for behoof of the contingent heir,—it was held, that the heir-at-law had no claim to the rents arising between the death of the trustor and the succession of the heir; for if a trust-deed contain no declaration as to the person for whose behoof the trustees are to hold the estate during the interim period, before the existence of an heir who could call on them to denude, the rents will not go as accessories. But it is different where there are words implying an intention on the part of the grantor that the rents shall

¹ Gillespies, 7th Dec. 1802, M. Acc. Seq. Prin. App. 2; see also Speed, cited Reid, 10th March, 1809, F.; Glasgow's Trustees, 30th Nov. 1830, 9 S. 87; Stevenson, 30th June, 1826, 4 S. 776.

² Cuming's Trustees, 26th Feb. 1824; Irving, 1st Dec. 1801, M. Life-renter, App. 1; Brander v. Brander, 4 Ves. jun. 800.

go to the person who ultimately gets the estate ; and by the law of Scotland, effect may be given to a trust for behoof of certain heirs, although the precise person may not for some time be ascertained.¹

Where trustees are directed by a *mortis causa* deed to convey the subject to the beneficiary at a certain period, and no provision is made in the deed for the accumulation of the interest upon the capital, the interest will be claimable by the beneficiary termly as it accrues, from the first term of Whitsunday or Martinmas, after a year from the death of the testator.² But where the destination of a trust-property was to a certain individual, failing issue of his body, there being no issue at present in existence, the Court allowed him to receive the rents, on caution to repeat in the event of issue.³

With regard to cases of property conveyed to trustees for the purpose of constituting entails, various questions occur as to the disposal of rents and interests, but these are very special in their nature.⁴

¹ Templar, 14th Feb. 1826, 4 S. 460, Aff. April, 1828, 3 W. S. 47.

² Campbell, 12th June, 1840, 2 D. 1084 ; see also Macalister, 29th June, 1827, 5 S. 862 ; Trotter, 26th November, 1839, 2 D. 140 ; and English case of Chatworth *v.* Hooper, 1 B. C. C. p. 82 ; Lovelace on Wills, Edn. 1838, by Bawn, p. 459.

³ Blackwood, 11th June, 1833, 11 S. 699. See *sup.* pages 208, 335.

⁴ See Earl of Stair, 12th Feb. 1823, 2 S. 205, Aff. 29th March, 1825, 1 W. S. 72 ; Do. 21st Feb. 1826, 4 S. 483 ; 24th May, 1826, 2 W. S. 414, 1st March, 1827, 5 S. 476 ; 19th June, 1827, 2 W. S. 614 ; Campbell's Trustees, 17th May, 1836, 14 S. 770 ; Stewart, 16th June, 1837, 15 S. 1153 ; Wilson, 11th July, 1833, 11 S. 995 ; Howat's Trustees, 17th Feb. 1838, 16 S. 622 ; Wellwood, 12th Nov. 1828, 2 S. 475 ; Trotter, 26th Nov. 1839, 2 D. 140. See *sup.* page 31.

CHAPTER IV.

QUESTIONS OF COMPETENCY REGARDING TRUSTS FOR PERPETUITY, ACCUMULATION, &c.

Law of Scotland. By the law of Scotland, trusts of heritage are not reducible, on the ground that they give rise to perpetuity.¹

Thelluson act. By the statute 39 and 40 Geo. III. c. 98, (best known as the Thelluson act,) it is enacted, "That no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, divisor, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled to the rents, issues, and profits, or the interest, dividends,

¹ M'Nair, 18th May, 1791, M. 16210, Bell's Ca. 546, 8vo.; Earl of Strathmore, 16th Feb. 1830, 8 S. 530; Aff. 5, W. S. 170; M'Leish's Trustees, 25th May, 1841, 8 D. 914.

or annual produce so directed to be accumulated;" and farther provided, "That nothing in this act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland." As to this act, it has been held, ^{Heritage in Scotland.} that, from the express exemption of the rents of heritable estates in Scotland, the presumption is, that no nullity exists, under the common law of Scotland, in such a trust, for the accumulation of rents or other funds for a limited term. And although ^{Duration.} the duration of that term be not as yet determined, it is by no means to be held that an objection might not exist to an accumulation which is to go on for ever.¹ A special exemption being contained in the ^{Moveables.} act, with regard to heritage in Scotland, and not as to moveables, the act is to be held as applying to Scotland in the case of the latter.²

The very extensive and important class of trusts ^{Mortifica-}
^{tions.} which occur in mortifications, are simply trusts for perpetuity. Such trusts as to heritage in England are illegal, by the 9th Geo. IV. c. 36,³ termed the Mortmain act. In Scotland, however, such trusts, being strictly lawful, differ but little in point of principle from ordinary trusts, and are, therefore, governed by the special terms of the trust-deed alone, where these are sufficiently specific.

¹ Per Lord Chancellor in Strathmore, *et sup.*

² Per *cundem.*

³ See *sup.* page 51.

Purposes for
which they
are used.

THE creation of a trust forms a most important provision in marriage-contracts, whether antenuptial or postnuptial, as it, indeed, affords the only secure mode of providing for the interests of wives and children, by protecting them against the influence of the husband and father.¹ Such trusts may be

¹ The law of England, as regards trusts for married women, is in principle similar to that of Scotland; see *Parke v. White*, 11 Ves. 228; *Harvey v. Harvey*, 1 P. W. 125; *Burton v. Pierpoint*, 2 P. W. 316; *Bennet v. Davis*, 2 P. W. 316; *Parker v. Brooke*, 9 Ves. 583; *Rollife v. Budder*, Bunn. 187; *Prichard v. Ames*, 1 Turn. and Russ. 222; *Newlands v. Paynter*, 10 Sim. 377, 4 M. and Cr. 408. The intention of excluding the husband must not be left to inference, but must be clearly and unequivocally declared; *ex parte Ray*, 1 Mad. 207, per Sir T. Plumer; *Wills v. Sayers*, 4 Mad. 409, *per curiam*; *Massey v. Parker*, 2 M. and K. 181, per Sir C. Pepys; *Kensington v. Dollond*, 2 M. and K. 188, per Sir J. Leach; but provided the meaning be certain, the Court will execute the intention, though the settler may not have expressed himself in technical language; *Darley v. Darley*, 3 Atk. 399, per Lord Hardwicke; *Stanton v. Hall*, 2 R. and M. 180, per Lord Brougham. The marital claims will be defeated if the gift be to the wife for "her sole and separate use;" *Parker v. Brooke*, 9 Ves. 583, &c.—or "her sole use;" *Adamson v. Armitage*, 19 Ves. 416, S. C. Coop. 283; *ex parte Ray*, 1 Mad. 199; —— *v. Lyne*, 1 Younge, 562—or for "her livelyhood;" *Darley*, *ut sup.*; and see *Cape v. Cape*, 2 Y. and C. 543; but see *Lee v. Prieaux*, 3 B. C. C. 383; *Wardle v. Claxton*, 9 Sim. 324; or, "that she may receive and enjoy the profits;" *Tyrrell v. Hope*, 2 Atk. 558; or "to be at her disposal;" *Prichard v. Ames*, 1 Turn. and Russ. 222; *Kirk v. Paulin*, 7 Vin. 96—or, "to be by her laid out in what she shall think fit;" *Atcherley v. Vernon*, 10 Mod. 531—or, "for her own use and benefit, independent of any other person;" *Margetts v. Barringer*, 7 Sim. 482—or if it be declared, "her receipt to be sufficient discharge;" *Lee, ut sup.* 381; *Woodman v. Horsley*, cited Ib. 383; and see *Stanton, ut supra*,—or, "to

said to be of two kinds, as they are constituted for the purpose of diligence, preserving the *corpus* or subject conveyed merely, so as to prevent its being wasted, sold, or burdened, the annual interest or rental being left to the disposal of the married parties, or either of them, or they are for administering the estate during the existence of the marriage, and subsequent thereto, under such provisions as shall be thought necessary;¹ as, to provide a certain annual sum, out of the profits of the estate, to the married parties, or either of them, during the subsistence of the marriage, the residue to be laid out or disposed of in such manner as shall be provided, whether for investiture in a certain manner, mere accumulation, or paying of burdens, or otherwise; and also providing, in a similar manner, for such property as shall be acquired by the wife during the subsistence of the marriage, as, by conveyance of an expectancy of succession to heritage or moveables.

Powers are in some cases reserved to the wife, ^{Reserved powers.} of doing certain acts, or creating certain specified burdens upon the estate during the subsistence of the marriage; as, for investing in particular kinds

be delivered on demand;" Dixon *v.* Olivius, 2 Cox. 414. But it has been held, that if the trust be, "to pay to her," or, "to her and her assigns;" Dakins *v.* Berisford, 1 Ch. Ca. 194; Lumb *v.* Milnes, 5 Ves. 517 — or the gift be, "to her use;" Jacobs *v.* Amyatt, 1 Mad. 376, n.; Wills *v.* Sayers, 4 Mad. 411, per Sir J. Plumer; Anon. Case, cited 7 Vin. 96 — or "her own use;" Tyler *v.* Lake, 2 R. and M. 183; Kensington *v.* Dolland, 2 M. and K. 184; but Hartley *v.* Huzle, 5 Ves. 545, *contra*; — or, "to pay her, to be applied for the maintenance of herself, and such child or children as the testator might happen to leave at his death;" Wardle *v.* Claxton, 9 Sim. 524, — there is no such unequivocal evidence of an intention to exclude the husband; see Lewin on Trusts, 115—118. In Scotland, no special forms of style are required, an express general declaration of intention to seclude the *jus mariti* being sufficient.

¹. The former is an accessory, the latter is a proper trust. See *sup.* part 1, c. 3.

of property ; providing, by way of loan upon security, or actual donation, funds to the husband for particular purposes, as, furthering his advancement in his profession, or other obvious advantage to both parties ; or providing for the outfit or settlement in life of the children of the marriage. But such reservations are of course liable to abuse, from the influence of the husband ; and, therefore, the concurrence of trustees to the application of the funds is frequently with advantage introduced along with such reservations. Her power even of disposing by *mortis causa* settlement, during the subsistence of the marriage, is sometimes, with a view to such influence, limited by the provision, that she shall not exert that power without the consent of the trustees. Such trusts, if for behoof of the wife only, may be brought to an end by the death of the husband anterior to that of the wife, the cause of granting being at an end;¹ or, if for children, on his death without children.² If for children surviving, it will subsist *quoad* their interest, as declared by the contract. Such trusts may, and indeed ought always, to be declared to be irrevocable during the subsistence of the marriage.³

Property belonging to the wife.

Where there is a settlement of the wife's own estate, the general rule applicable to all marriage-contracts applies on the same principle as if it were a settlement by the husband of his estate, viz. that there is no *jus crediti* to any one, or any class of persons, mentioned, except the parties and heirs of the marriage ; the trust is a burden on the wife's title, but the title itself re-

¹ Anderson, *et seq.* p. 82.

² Anderson, *et seq.*

³ M'Leod, 20th July, 1841, 3 D. 1288.

mains, and the clauses of the eventual destination to other parties or heirs are simple destinations conferring no *jus crediti*, and defeasible by her at pleasure; and in so far as the estate is provided to the heirs of the marriage, it is competent to put forward the succession to the son, the existing heir of the marriage, or to transact with him so as to extinguish the *jus crediti*. Thus, where the trust-deed was in the form of a postnuptial marriage-contract, settling estates which belonged to the wife exclusively, for supporting the parties and issue of the marriage, and providing for various events chiefly depending on her not having a child who should attain majority, and making a large provision in favour of certain heirs of the wife, in the event of the issue of the marriage not surviving her—the wife, having had a son who attained majority, concurred in his marriage-contract, to the effect of securing to him the whole estate, with a reserved burden of a certain annual sum in favour of herself—the question arose as to whether there was any interest in those to whom the reversionary provision was made to challenge this marriage-contract, and whether the trustees were bound to denude in terms of it,—it was held by Lord Moncrieff, and confirmed by the Court, that she and her son had the entire right and interest in the lands and fund, and were entitled to convey the estate in the son's marriage-contract, or otherwise, and to require the trustees to denude.¹ So, also, where, in an antenuptial marriage-contract, the husband bound himself to pay a

¹ Craigie, 17th June, 1837, 13 S. 1157.

certain annuity, and, after his death, a certain sum to the children of the marriage, to be in full of legitim, terce, &c., to meet which annuity and provisions he bound himself to invest a sum, and also bound himself to affect an insurance on his life for a certain sum, the policy being taken payable to the trustees under the marriage-contract, to form part of the trust-estate vested in them, the said trustees to be entitled to pay the annual premium upon the policy of insurance out of the proceeds of the trust-estate, and, in the event that the trustees should see meet to exercise a reserved power to uplift and realize a certain sum, equal to the sum insured, for a certain purpose, that then the policy should stand in lieu thereof. And, on the other hand, the wife conveyed her whole means and estate to the trustees, to pay, during the subsistence of the marriage, the interest or annual produce of the trust-estate, after deducting the premium of insurance and all necessary expenses, to the wife, exclusive of the *jus mariti*; and, in the event of children of the marriage, at the period of the death of either party, the interest to the said survivor, and the fee to the child or children, but not to vest till the death of the last surviving spouse, and, failing children, the residue to be at the disposal of the wife. The power being used, and the sum raised, by the trustees, and applied to the purpose intended, the husband having become bankrupt, and there being no children of the marriage, and the wife being wholly without means of support, it was held, that the children had merely a *spes successionis*, to which any alimentary debts contracted by them would be

preferable, and that, therefore, the trustees were authorized and should be ordained to apply the whole interest of the fund towards alimenting her.¹

Trusts for
legal dili-
gence.

The principal purpose of trusts in marriage-contracts is, however, to enforce against the husband the conditions contained in the contract, and so to overcome the difficulties attending the conducting of proceedings by a wife or children against the husband or father.² Thus, where trustees were appointed under a marriage-contract, in order that execution upon the contract might pass at their instance against the husband for a certain sum, for behoof of the wife in liferent, and the children of the marriage in fee, and the trustees, finding the affairs of the husband to be embarrassed, raised a summons of adjudication of his heritable estate, as conveyed under trust for his behoof,—it being objected that such adjudication could not be deemed in implement of the contract of provision without a previous constitution of the provision,—it was held, that, being of the nature of *dotalitia actio*, the adjudication might proceed without constitution by a previous charge of horning or personal diligence.³ By the appointment of such trustees, serious difficulty may be overcome. Thus, where a party was bound by contract of marriage to secure a sum to the children of the marriage, he having married again, action at the instance of a daughter of the first marriage on the contract, against the father, was held incompe-

¹ Gibb, 8th June, 1839, 1 D. 889.

² See Home, 16th July, 1708, M. 12900; Herries, &c. 9th March, 1838, 16 S. 948; Ramsay, 11th July, 1833, 11 S. 967; Sinclair, &c. 22d January, 1840, 2 D. 356; Hay, 28th June, 1709, M. 12967; Innes, 18th November, 1829, 8 S. 71.

³ Anderson, 27th January, 1714, M. 58. See also Lyon, 24th January, 1724, M. 12909.

tent during the life of the father.¹ This objection would have been avoided, had there been trustees named in the contract.

The rights and obligations attending these trusts are precisely similar to other trusts, in the nature of an obligation, as creating a right in a third party. Thus, where a husband, in his marriage-contract, conveyed his property to a trustee, with power to sue all actions relative to the reduction of settlements of his uncle and father, deceased, he was held bound to allow his name to be used for this purpose by the trustee, and not entitled to disclaim an action raised in his name, the trustee relieving him of the expenses and consequences of the action.² But such trustees are appointed merely for the purpose of doing diligence, and their appointment, therefore, does not entitle them to supersede the father in the education of the children of the marriage.³ Where a husband became bound, in his marriage-contract, to employ certain eventual provisions assigned to him by his wife, in security of her jointure, she was held entitled, while the sums so assigned were *in medio*, and even in a question with his creditors, to insist that they should be preserved, so as to secure the provisions promised.⁴

¹ Oliphant, 10th Feb. 1704, M. 12966.

² Pitcairn, 21st June, 1834, 12 S. 769. With regard to the latitude allowable in interpreting trust-deeds, the English law makes a distinction between executory trusts in *marriage-articles*, where the Court has a clue to the intention from the nature of the contract, and executory trusts in *wills*, where the Court knows nothing of the object in view, *a priori*, but, in collecting the intention, must be guided solely by the language of the instrument; Lewin, on T. 48; Lord Deenhurst v. Duke of St Albans, 5 Mad. 260, per Sir J. Leach; Maguire v. Scully, 2 Hog. 113. This is a very proper distinction between *mortis causa* deeds and certain deeds *inter vivos*.

³ Hamilton, 2d July, 1696, M. 12965.

⁴ Buchanan, 6th March, 1787, M. 9201.

Trustees under a marriage-contract may insist, in an action after the death of the husband, for having the provisions of the marriage-contract implemented.¹

A conveyance in trust may be made by a relation or other party, in trust for behoof of a married woman, in such terms as to exclude the *jus mariti* of the husband, and all claim against it at the instance of his creditors, in the event of his failure. Thus, a settlement of his estate may be made by a father to his married daughter, in trust for herself and children, her husband's power of administration, in the event of his future insolvency, being excluded.²

Trust by a
third party for
behoof of a
married
woman.

¹ Hill, 14th Nov. 1765, M. 16125; Do. 12th Feb. 1766, M. 16207.

² Annand, 4th March, 1774, M. 5844. See also Lewin on Trusts, 116.

CHAPTER VI.

IDENTIFICATION OR SPECIFICATION OF BENEFICIARIES OR PURPOSES.

FROM the latitude allowed in the law of Scotland, in regard to the purposes of trusts, the questions arising in regard to these, chiefly relate to the description of the party or specification of the purpose intended. The description of the party for whose behoof, or the purpose or object for which, the trust is intended, must be distinctly stated and ascertained. It is not necessary, however, that the special party intended shall be actually named or specially described,—it is sufficient if he be pointed out by such a general distinctive mark, as to enable the party or purpose intended to be ascertained.

How identified.

Order of succession. Thus, it is sufficient to declare that the property shall go in terms of a certain order of succession, as, “to my next of kin according to the law of England, or statute of distributions.”¹

Heirs and bairns. A destination of heritage to “heirs and bairns” carries the estate to the heir in heritage.² Where the bequest of a certain sum “to each of the daughters” of a certain marriage, was stated as amounting in all to a sum which implied that there were only

Error calculi.

¹ Bellenden, 14th Feb. 1825, 3 S. 530.

² Duncan, 9th Feb. 1813, F.

three, whilst there were in reality four, it was held, that each of the four was entitled to the full share bequeathed.¹

Where a sum was conveyed to trustees for the purchase of land, the annualrent of which was directed to be applied to the purposes of a certain farmers' club, and that club, by consent of a majority of its members, joined another one of a similar kind, but different name, the minority of the original club dissenting, it was held, that the junction of the clubs was merely an extension of that in question, and that there was no such misapplication of the bequest as to warrant the interference of the Court, especially as it appeared that the club in question had not strictly confined their exertions to a local district.² Where a party directed all the residue of his trust means and estate to be divided equally amongst the Edinburgh Bible Society, the Edinburgh Missionary Society, the Society for Promoting Christianity among the Jews, and the Society for Establishing Protestant Schools in Ireland, it being declared, that the receipts of the treasurers

Bequest to a society.

¹ Maclehose, 28th Feb. 1815, F. As to erroneous name or designation of beneficiary, see Keiller, 15th Dec. 1824, 3 S. 396; Do. 16th June, 1826, 4 S. 724.

² Pringle, 16th December, 1823, 2 S. 588. So also where a party abroad bequeathed "to the minister of Dingwall, for the time being, the sum of £.300, on account and for behoof of the female charity-school instituted in Dingwall by Miss Mary Robertson," and the school in question had been discontinued two or three years previous to the date of the bequest, it was held by Lord Ivory, that, notwithstanding the discontinuance of the school actually set on foot by Miss Robertson, the legacy was not to be held as having lapsed, but that, on the contrary, the purpose and intent of the testator must be held to have been to invest the sum on an abiding trust in the minister of Dingwall for the time being, to be by him applied on account and for behoof of a charity-school in Dingwall, of the like kind, and conducted on the like principles, with that in which Miss Robertson was concerned; Bethune v. Cameron, 15th March, 1843.

and secretaries of these societies should be deemed, to all intents and purposes, a sufficient exoneration to the trustee or trustees acting for the time, it was held, that the designation of these societies was sufficient, as,—although it was objected that the Scottish Missionary Society had a different denomination from that mentioned in the will, yet, as it was composed of the same individuals, and had the same object, it must be held the same—that it did not appear that the donation to the Society for Promoting Christianity among the Jews was limited to an Edinburgh Scottish Society, and that it was of no consequence that it had its management in London, there being no society in Edinburgh of that denomination—that, as to the bequest to the Society for Establishing Protestant Schools in Ireland, there being a competition between the Charter School Society for Promoting English Protestant Schools in Ireland, and the London Hibernian Society for establishing schools and circulating the Holy Scriptures in Ireland, the former was to be preferred, the bequest being to promote “Protestant” schools—and that the societies were entitled to appear and claim their legacies in a court of law, by their own name, or that of their directors, with the treasurer or secretary, or in the name of the treasurer or secretary alone.¹

Power of
allocation
conferred by
deed.

The question, Whether it is competent to leave the nomination of the person who is to take the succession or benefit of the trust, to a particular person, or to the trustees? has given rise to much discussion. It is thus stated in the able judgment

¹ Sommervail and Others, 22d Jan. 1830, 8 S. 370.

of the Lord Chancellor, (Lyndhurst), in the case of Crichton *v.* Grierson,¹ "Whether it is competent for the disposer, by a deed of this description, to point out particular classes of persons and objects which are intended to be the object of his favour, and then to leave it to an individual, or body of individuals, after his death, to select out of these classes the particular individuals, or particular objects, to whom the bounty of the testator shall be applied. It is contended, that, to give effect to the decision of the Court below, will be, to allow a person to delegate to another the power of making a will for him, which is said to be directly contrary to the civil law, and directly contrary to the law of Scotland, which, it is said, is founded on the civil law. But I apprehend that that is not the way of considering that question. I cautiously abstain from expressing my opinion on that point, which was adverted to in the course of the argument, and is much dwelt upon in the papers on your Lordships' table, because I think that the question does not at all turn upon that position — that it narrows itself to this,—whether a party may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power, after his death, of appropriating the property, or applying any part of his property, to any particular individuals among that class whom that person may select and describe in his will ? I apprehend, that, according to the authorities in the law of Scotland, it is quite clear a party has this power.²" His Lordship then goes on to detail the authorities,

¹ 25th July, 1828, 3 W. S. 338.

² See also Miller, 23d Feb. 1836, 13 S. 555 ; Aff. 2 S. and M. 866.

Special
instances.

Where discretion in trustees.

which vary considerably as regards the purposes for which they were intended, and are briefly as follows:

1. That, all legacies being paid, his executor should remit the surplus money to certain individuals specially named, "to be by them divided equally amongst my relations not herein named."¹
2. A disposition by a husband of his land estate to his wife, in liferent, and to any of his blood relations she should think most fit, to be nominated by a writ under her hand, in fee.²
3. The remainder of the testator's means and estate to be divided amongst his poorest friends and relations forgot to be mentioned in the deed; in which it was held, that the trustees were vested in a discretionary power so to divide it among them, whether connected by the father's or mother's side, without distinction of degree.³
4. To such of my mother's relations as my kind and respected friend — shall appoint, by a writing under her hand.⁴
5. A disposition to the magistrates of a city, of funds to be applied, according to their discretion, among the poor labourers of that city. Here the property was disposed in favour of a particular class of persons, out of whom a selection was to be made.⁵
6. To be applied in aid of the institutions for benevolent purposes, established, or to be established, in a certain city and its neighbourhood, in such way and manner, and in such proportions to the principal, the capital, or the interest or annual proceeds of the sum so appropriated, as to the trustees should seem proper, declaring, that they should be the sole judges

¹ Wharrie, 16th July, 1760, M. 6599.

² Murray, 28th Nov. 1729, M. 4075.

³ Brown, 3d August, 1762, M. 2318.

⁴ Snodgrass, 16th Dec. 1806, M., *Service of Heirs*, App. 1.

⁵ Horn, cited in Hill, 14th April, 1826, 2 W. S. 87.

of the appropriation of the residue for the purposes aforesaid.¹ 7. A bequest by a party resident in a certain city, of a sum of money, to be laid out in lands for the maintenance of a school for teaching boys reading, writing, and arithmetic, to be under the management of the magistrates and ministers of the Established Church; which bequest was held not to be void from uncertainty, as the magistrates of the said city must be held as those referred to.² 8. And, lastly, in the case of Crichton *v.* Grierson, already mentioned, to be applied in such charitable purposes, and in such bequests to such of the trustee's friends or relations as might be pointed out by his wife, with the approbation of the majority of the trustees.³

In accordance with the views stated in the House of Lords, in the cases of Hill and Crichton, in the recent case of Black's Trustees *v.* Miller and others,⁴ it was held, that a conveyance of the residue of the testator's estate to trustees, for the purpose of making yearly payments to faithful domestic servants settled in Glasgow, or the neighbourhood, who should be able to produce testimonials of good character and morals from their masters or mistresses, after ten years' service, none to be entitled to more than £.10 sterling yearly, but as much less as the trustees might think proper; or, in the event of the residue not amounting to £.600, to distribute the same to such charitable and benevolent purposes as the trustees

¹ Hill, 14th Dec. 1824, 3 S. Aff. 2 W. S. 80.

² Murdoch, 30th November, 1827, 6 S. 186. See part 2, c. 2.

³ This subject, with the authorities, will be found discussed at length in the appeal cases in Hill and Crichton, now mentioned.

⁴ 23d Feb. 1836, 14 S. 555; Aff. 2 S. M. 866; see also M'Leish's Trustees, 25th May, 1841 3 D. 914.

might think proper—was held not to be void through uncertainty.¹

¹ There is one authority which, however, has been argued on as being opposed to this train of decisions, namely, the case of *Dick v. Ferguson*, 22d Jan. 1758, M. 7446, where a settlement of considerable funds was made on the eldest son and eldest daughter of the testatrix, and the survivor, as trustees who were appointed to add to and join together the subjects disposed, so as to make up a total sum of £.6000 sterling, to be lent out upon land, or other sufficient security, and then to apply and bestow the yearly interest towards the education and support of such of the grantor's descendants as should happen to be in want, or stand in need thereof, and that at the discretion of the trustees; and, failing the descendants, that the capital should return to the nearest heir of the testator. This deed being thought whimsical and irrational, the trustees refused to accept, and the deed was held ineffectual from their non-acceptance. On the authority of this case, and the opinion of Lord Gifford in the case of *Hill*, Mr Bell, 1 Com. 36, states, "that where there is reference to an event which leads to uncertainty or inextricability, the trust no longer can subsist, but the true heir takes the right." No doubt, where the trust fails, the right of the heir-at-law comes into action, (see *Trusts by operation of law*, *sup*, part 3, c. 2, s. 3;) and, upon this ground, deeds have frequently been attempted to be reduced as impracticable from the commencement, but unsuccessfully in general; and what would be held as such circumstances, is not exemplified in the case referred to. As an instance of the latitude allowed in regard to the conditions and provisions of trusts, see the case of *Macnair*, 18th May, 1791, M. 16210. The only case on record in which such an objection has been sustained, appears to be that of *McCulloch*, (Barholm,) fully cited in *Strathmore*, 5 W. S. 180, on which ground alone it would appear that judgment can be placed; per Lord Chancellor in *Strathmore*, *ut sup.* The case of *Dick* is fully considered in the opinions in the House of Lords, in the cases of *Hill* by Lord Gifford, and *Crichton* by Lord Lyndhurst, and undoubtedly neither these opinions, nor the views of that case there stated, lead definitely to such a conclusion; for although not without importance, as an authority it amounts to this merely, that discretionary trusts fall by the non-acceptance of the trustees. This case is also of importance in regard to another observation by Mr Bell, *ut sup.* that "whether it is sufficient to point out such persons" (viz. beneficiaries) "by reference to the will of another, has been much doubted; and the doubt has been rested on this footing, that while no one can make a will which depends entirely on the will of another, there must in every trust be a responsibility by the trustees at the call of some one having a distinct interest; an uncontrollable power of disposition being ownership, not trust;" as to which reference is then made to the English case of *Morice v. Bishop of Durham*, 6 Ves. 404, wr. ref.; should be 9 Ves. 399, and 10 Ves. 521. But this is plainly incorrect as a general rule, as appears from what has already been said, and from the authorities which have been quoted, (see Powers,) which shew that discretionary trusts, which are trusts in which, as is clearly stated in the case of *Dick*, there is no right in any party to compel fulfilment in terms of the trust, (except, perhaps, in the heir of the testator, when there has been acceptance,) which are perfectly legal in the law of Scotland.

In these cases, there was a certain fund, and the ambiguity as to the appropriation was got over by the discretion vested in the trustees. But where a certain sum was directed to be paid by a party's trustees to the magistrates of a certain burgh, who were directed to lay it out at interest until the principal sum and accumulated interests should amount to the sum of L.— sterling, and thereafter to employ the interest for erecting and maintaining of an hospital for the maintenance, clothing, and education of — boys, it was held, that, as the sums constituting the provision were uncertain, and the objects of the trust were also uncertain, and as there was no discretion vested in the trustees, the bequest fell.¹

¹ Ewen, 17th Nov. 1830, 4 W. S. 346 ; reversing do. 6 S. 479.

CHAPTER VII.

TRUSTS IN SOCIETY OR PARTNERSHIP.

Their special nature. AN important class of trusts occur also in the case of society or partnerships, which are usually constituted for the purpose of investing in the trustees property belonging to a society, which, as already stated under the head of duties of trustees, are governed by the rules applicable to trusts generally. Such trusts are, however, of a distinct kind, the beneficiaries being the trustees, and are almost invariably a combination of trust and partnership, the parties appointed trustees having usually an interest or right of property in the subject conveyed. Various questions consequently arise regarding the effect of these, as in latent trusts, &c. The consideration of such trusts falls chiefly under the class of business trusts.

Dissenting chapel trusts. Trusts of this nature are of very common occurrence in the case of large bodies of the inhabitants of particular districts forming associations or societies for religious purposes, as the erecting and maintaining of dissenting chapels, the property of which is usually vested in a committee or select portion of their number, for behoof of the body generally. Such trusts are necessarily of an anomalous kind, and frequently give rise to difficult legal questions,

more especially in consequence of the tendency of the members of such societies to disunion, from alteration of opinion relative to religious doctrines and church-government; for, emphatically, the maxim of the Roman law, *societas est mater discordiarum*, is applicable to them.

Two questions chiefly arise in regard to these,
first, What makes a party a member, and therefore
liable for the debts of the body? which is a question
of partnership;¹ secondly, To whom does the pro-
perty belong, in the event of a disagreement among
the body? In regard to this last, the civil courts
are prevented, by the general law of toleration,
(1690, c. 5 and 27, and 1710, c. 7,) from adjudicating
upon their opinions. But if their original articles
of agreement bear reference to a particular species
of doctrine or form of superintendence by pres-
byteries or bishops, the members of the society who
adhere to the original form will be supported by
the civil courts as having a tangible or intelligible
ground of preference.²

Questions
which chiefly
arise as to
these.

¹ It would seem, that where a chapel is built by contract with or for a congregation of dissenters, the contract binds all who then are acting as members of the congregation, and enjoying the privileges of members, whether admitted such according to all the ecclesiastical rules of the body or not; Wallace, 31st May, 1838, 16 S. 1065. Liability to the clergyman may be incurred by signing the call and stipend bond, or by attending as members, and paying part of the stipend; Arthur, 28th May, 1823, 2 S. 343; see also Jeffrey, 16th Dec. 1823, 2 S. 554. But unless a written obligation be entered into binding themselves otherwise, the members of a religious association are not bound to pay the stipend of a minister whom they have called and appointed, longer than they adhere to the congregation; Hyslop, 14th June, 1825, 4 S. 84. Where parties granted a bill jointly and severally, styling themselves "the committee and congregation" of a religious society, they were held personally liable; Ross, 14th Jan. 1831, 9 S. 275.

² Davidson, 27th June, 1805, M. 14584, and 1 Dow, 1; Bulloch, 31st Jan. 1809, F.; M'Intyre, &c. 24th Feb. 1809; Smith, 21st Feb. 1843, 5 D. 665. It was originally held, that such bodies could not hold property by themselves or trustees; Wilson, 30th June, 1752, 5 B. Sup. 798;

Purposes in abeyance.

Such a trust, being once established, does not necessarily fall by the trust-purposes ceasing for a time to be kept in operation. Thus, where those who adhered to the original principles did not choose a minister for several years, yet, on doing so, the trust was held to revive and be effectual.¹

Administration of trust-affairs.

With regard to the administration of the trust-affairs, and general powers of the trustees, each trust must depend, of course, very much on its own special terms; the general form is for the property to be invested in a certain number of the senior members, for preservation and conducting of the ordinary routine matters connected with the body, or such matters as may be specially intrusted to them, as executing works, representing the body in transactions with third parties, &c. — all matters of importance being reserved for the disposal of the body generally, at meetings regularly summoned by announcement from the pulpit. At such meetings are usually disposed of all questions relating to the trust-estate, appointment of trustees, minister, &c. a majority of the body being held as the body in making such appointments.²

Pollock, 8th July, 1752, Elch. Title to pursue, 2; but subsequently, that they might hold property by trustees for behoof of the majority of the contributors; Wilson, 13th Dec. 1771, M. 14555; Allan, 25th May, 1791, M. 14583; Dunn, 13th May, 1801, M.; Society, App. 3; and ultimately as above by the House of Lords. So, also, in England, the intention of the settlor is preferred; Attorney-General *v.* Pearson, 3 Mer. 400, per Lord Eldon; Folley *v.* Wontner, 2 Jac. and Walk. 245, *per eund.*; Miligan *v.* Mitchell, 3 M. and C. 72; Attorney-General *v.* Shore, (Lady Hewley's Charity,) 7 Sim. 309, note; and Dill *v.* Watson, (Clough Case,) 1836, I. E. R. This subject is very fully considered in the case of Smith, (Campbelton Case,) *ut sup.*

¹ Craig, 18th Feb. 1823, 2 S. 224.

² See *ex parte Morison*, 18th Jan. 1834, 12 S. 307; and 11th March, 1834, 12 S. 547; Eng. Ca. of Davis *v.* Jenkins, 3 V. and B. 151, 159; Leslie *v.* Birnie, 2 Russ. 114. It has been held in England, that a

A trust is in itself of so sacred a nature, that where an agreement is entered into for purposes such as those in question, and land obtained for erecting buildings, such land cannot, without the consent of all concerned, be turned to any other use than that for which it was originally intended by the deed of agreement for which the feudal titles were obtained.¹ Thus, also, where the box-master, and other managers of an ancient charitable society, of their own accord introduced material alterations in the constitution of the society and the application of the funds, whereby many persons, formerly contributors, and entitled to relief, were deprived of the benefits and privileges of the society, — it was held, that the proceedings of the managers were illegal and invalid; and that they held the property of the society as trustees for the members, or those entitled to be members thereof; and that the persons affected by those proceedings were still entitled to all the

minister in possession of a meeting-house is tenant-at-will to the trustees, and that his estate is determinable by demand of possession without previous notice; *Doe v. M'Kaeg*, 10 B. and Cr. 721; and that he may, by custom or provision, be removable at pleasure; *Attorney-General v. Pearson*, 3 Mer., 402, per Lord Eldon. In Scotland, the rights of the minister must of course be measured by the terms of his appointment. In England, if the minister be in possession, and preaching the doctrines that were intended by the founders, it is the practice of Courts of Equity to continue him and pay his salary until the question can be determined as to whether he was duly elected or not; *Foley v. Wontner*, 2 Jac. and Walk. 247, per Lord Eldon. So, also, in Scotland, where the church-judicatures of a dissenting body had pronounced a sentence, declaring the minister of a church in their communion out of connection with them, the Court awarded a joint possession of the church by alternate diets, to the minister, on the one hand, and such persons as the judicatures should appoint on the other, pending a declarator as to whether the minister's incumbency under his agreement with the proprietors of the church, and his right of possession, had been brought to an end by that sentence; *Galbraith, &c.* 10th March, 1837, 15 S. 808.

¹ *M'Gaskill*, 6th Feb. 1840, 2 D. 587.

Application
of trust-pro-
perty.

privileges and benefits to which they would otherwise have had right.¹

As the trustees in such cases hold the property for behoof of the body, the trust may be brought to an end, and the trustees denuded, at the instance of a majority of the contributors adhering to the original principles of the community.²

¹ Steedman, 23d June, 1842, 4 D. 1441.

² Allan, 25th May, 1791, M. 14583. Friendly society trusts, as being in the nature of public or statutory trusts, will hereafter be considered under that head. The acts relative to these now in force are, 10 Geo. IV. c. 56 ; 2 Gul. 4, c. 37 ; 3 and 4 Vict. c. 73 ; see *susp.* page 18.

CHAPTER VIII.

RIGHTS AND INTERESTS OF CREDITORS AS AFFECTED BY TRUST-DEEDS.

1. CREDITORS are either trust-creditors — that is, creditors at the date of the trust, — or future creditors — that is, creditors whose debts are contracted subsequent to the date of the trust-deed. The former are either acceding or non-acceding creditors. In private trusts for behoof of creditors, the property becomes vested in the trustee for their behoof, and continues to be so until their claims are fully liquidated, or the funds exhausted. They are not bound by any conditions which shall be inserted in the deed by the trustor, except for selling the trust-estate, unless they shall specially accede thereto. The rights of acceding creditors may be materially affected by the form of the conveyance. If a conveyance be to a trustor's creditors *nominatim*, according to their just claims, as specified, or competently approved of, with a right of reversion, merely to the trustor, which is the proper form, the claims of the creditors are thereby constituted as real burdens on the estate, and are effectual against future creditors. But if it be simply a conveyance in trust for behoof of creditors, without specifying them individually, it will not give a preference. In order to do so, and, in effect,

Creditors at
date of trust-
deed.

to give a security to certain creditors, it is necessary that the deed shall bear to be for behoof of creditors *now existing*, that is, creditors at the date of the deed.¹ It has been held, that the name of a creditor being inserted in a back-bond of trust, is sufficient to establish his claim on the estate.² Where the holder of a bill, which was not then prescribed, acceded to a trust-deed for creditors, which, with the deed of accession, and the infestment following thereon, narrated the debt, and it was recognized in the correspondence of the trustee, in the minutes of the creditors, and in the deed of conveyance of the estate to the heir of the trustor, the latter being dead, and, in the meanwhile, sexennial prescription took place,—it was held, that the prescription could not be opposed to a demand for the debt.³ It has been held, that the enumeration of a debt by the trustor is sufficient to establish it as a claim on the estate, although the deed declare, that, although so enumerated, claims are still to be open to objection.⁴ But the correctness of this decision seems very doubtful. Of course, trustees must be invested, as in other trusts, to complete the preference. But a revocable trust-settlement, by which a party conveyed his whole

¹ Duke of Norfolk, 14th Feb. 1752, M. 7062; Dewar, 4th Dec. 1792; Bell Ca. 541 8vo.; Chalmers, 27th Jan. 1791, Hume, Seq. Pap.; M'Ewan, 18th June, 1793, M. 5596; Anderson, 24th Dec. 1784, M. 4128, incorrect report, see 2 Bell Com. 490, note 2, Ib. v. 1,689, and Bell's Ca. 541; Snodgrass, &c. 18th Nov. 1744, M. 1095. See future creditors, *infra*, 422.

² Pitmedden, 9th Dec. 1707, M. 16100.

³ Ettles, 15th Feb. 1833, 11 S. 397. But where a party merely intimated to the law agents of trustees of an alleged debtor, that he had a claim to make, and, at the agent's request, transmitted a statement of his claim, which rested on a bill, and both parties then allowed the matter to lie over for nine years, it was held, that the course of prescription on the bill had not been interrupted; Ewing, 12th Nov. 1835, 14 S. 1.

⁴ Coulter, 21st June, 1775, M. 1601.

property, at his death, to certain trustees for payment of debts, and other residuary purposes, was held insufficient to prevent his creditors from obtaining preferences by legal diligence.¹

It is a valid objection to a party named as a creditor, in a list annexed to a trust-deed, that he comes under the class of conjunct and confident persons, in terms of the statute 1621, c. 18, which renders it necessary that he shall prove his claim.²

As, by acceding to a trust-deed, creditors come in place of the trustor, the trustee being bound to account, in the first place, to them only, so, likewise, they necessarily become bound to relieve the trustee of all obligations competently incurred in the management of the trust-affairs.³

By so acceding, they become bound to refrain from all judicial or personal interference with trust-property, and unnecessary interference with the conducting of the trust-affairs by the trustee.⁴ Thus, they cannot interfere by transacting with the trustor.⁵ Such trusts are much favoured by law, as being preferable to judicial settlements. Thus, where the trust-deed was for the payment of debts, with a clause declaring that it should not fall by the death of the trustee, but subsist as a security to the creditors, which was acceded to by deed; and, on the death of the trustee, the creditors named a committee of management, and appointed a factor—and an assignee to the debt of a creditor, who had acceded

Effect of
acceding as
regards
the acceding
creditors.

Must refrain
from Judicial
proceedings,
&c.

¹ Thomson, 10th March, 1798, M. 1224.

² See Garden, 26th Nov. 1822, F.

³ Mercer, 11th Dec. 1828, 2 S. 574.

⁴ Crichton, &c. 4th March, 1836, 14 S. 628; and see Stobie's Trustees, infra, page 421; and Russell, 15th Dec. 1827, 6 S. 255.

⁵ Meldrum's Trustees, 13th Dec. 1826, 5 S. 122.

to the trust, took separate measures, and applied for sequestration and the nomination of a judicial factor,—it was held, after notice to all the creditors, that this application ought to be granted, and a factor was accordingly named. But this judgment was reversed in the House of Lords, on the ground that the whole trust-arrangement acceded to was intended to avoid a judicial management—that this is a course preferable, and to be favoured; and as, by deed of accession, the creditors bound themselves not to follow separate courses or suits at law.¹

May enforce
fulfilment of
trust.

Creditors are entitled to enforce the proper conducting of the trust-affairs, and realizing of the funds. Thus, where a party, who, by accepting an obligation from trustees, to pay a debt out of the trust-estate, was held to have acceded, he was held entitled to adjudge the trust-estate in payment of his debt, the trustees having taken no steps to realize the funds.² So, also, if a trust for creditors shall be so far neglected, as to become, in a manner, in abeyance, by its duties being neglected, and the office of trustee allowed to cease by the death of the trustee, without a new one being appointed, in such a case a creditor, who has been held constructively to have acceded, will not be prevented from proceeding to realize his claim independently of the trust, even although *supersedere* of diligence should have been a condition of the trust-deed.³ In a regular case of accession, it would, of course, be in the power of the creditors to supply the defect, and

¹ Littlejohn, 15th Dec. 1832, 11 S. 217, and 8th July, 1834, S. Sup. 172, 2 S. M. 355. See also Smith, 10th July, 1830, 8 S. 1063; and Forbes, 4th Dec. 1838, 1 D. 141.

² Earl of Breadalbane, 16th Jan. 1824, 2 S. 621.

³ Littlejohn, 11th June, 1833, 11 S. 701.

insist in the proper conducting and conclusion of the trust, so that such irregularities would there be obviated. Accession by a creditor does not prevent diligence being used by the creditors of the acceding creditor against him, but, on the contrary, founds it, as it constitutes the claim against the trust, as coming in the place of the trustor, or common debtor.¹ A debt against an insolvent trustor, subsisting prior to the execution of a trust-deed for creditors, cannot be pleaded in compensation of a claim by the trustee, arising subsequent to the trust-deed.² It is a legal rule relative to insolvency, that the creditors of the insolvent party, or rather the trustee for their behoof, acquires the whole property of the insolvent party, real and personal, as it stands formally vested in him, without becoming liable to fulfil his personal obligations. They are merely bound to rank, for their damages, those creditors to whom he stands bound by contract. Hence, if he have a formal title to lands, the trustee acquires them without incurring liability for any personal obligations of the insolvent, as to reconveyance, &c.³ This is not an annulment, as has been erroneously thought,⁴ of the doctrine of *tantum et tale*, but a principle incident to the law as to insolvency.

Where a party was rendered bankrupt by an execution of search, within sixty days from the date of a private trust-deed — and the execution was reduced in an action by the private trustee against the creditor who used the diligence, — it was held,

¹ See Grierson, 25th Feb. 1780, M. 759.

² Mill, &c. 22d Nov. 1825, 4 S. 219. See *sup.* page 116.

³ Wylie, 8th Dec. 1803, M. 10269.

⁴ See Ersk. Instit. b. 2, t. 12, s. 36, note 352.

that another creditor, who had not been a party to the process of reducing the execution, was entitled, in challenging the trust-deed on the ground of the bankruptcy, to found on the execution, notwithstanding the decree of reduction, it not being offered to be proved that the execution was irregular, or that the debtor had not been rendered legally bankrupt.¹ And again, a reduction of a trust-deed by creditors of the trustee, on the ground of its having been granted by him after bankruptcy, and containing clauses and powers disadvantageous to their interests, and to be reponed, &c. *in integrum*, does not necessarily amount to an absolute and total reduction of the deed, but only *quoad* the interest of the creditors pursuing.²

With regard to the effect of a trust-deed and deed of accession upon the rights of succession of the heirs and executors of creditors, where an heritable security is conveyed to trustees for behoof of a creditor, or of creditors, thereby creating a preference in favour of such party or parties, it will be heritable in the creditors, and therefore pass to their heirs in heritage. But where heritable rights are conveyed to trustees for the security, or to be applied for behoof of, creditors in personal debts, whereby the right given to each creditor is merely to call the trustee to account, the nature of which debts are not altered by the mere enumeration of them; such rights in the creditors are of a personal nature, and go to their executors, or heirs in moveables. Thus, where the conveyance was for the payment of debts and other purposes, which were declared to be real

¹ M'Hardy, 18th June, 1883, 11 S. 735.

² Ker, 28th January, 1830, 8 S. 408.

burdens upon, and affecting the trust-right and infestments to follow thereon, and to subsist and continue as a security to all the said creditors, until the sums due to them should be fully paid and discharged,— the debts so secured were held to be moveable, *quoad* the succession of the creditors.¹

Non-acceding creditors have no right vested in them under the trustee's infestation, and he is not responsible to them *qua* trustee.²

Another kind of trust for creditors takes place thus:— A number of creditors, whose claims rest on open account, frequently, to avoid expense, assign their claims to an individual, who, as trustee on their behalf, obtains a decree of constitution against their debtor.³ Such decree may be used as a warrant for diligence, real and personal. Such trusts are also created for the purpose of adjudging trust-property, and bringing a ranking and sale. Thus, where, in the course of the management of trust-affairs of a deceased party, it appeared that the debts of the deceased could not be paid without a sale of heritable property, for which no powers had been granted to the trustees, an arrangement was made, to which all the creditors acceded, that they should assign their debts to a trustee, who should adjudge the property, and bring a ranking and sale. This arrangement having been put in execution, and a process of ranking and sale having been brought, it was held, that an action of multiplepoinding, raised by one of the creditors in name of the original trustees, with reference to the trust-property, was incompetent.⁴

¹ Hawkins, 23d May, 1843, 5 D. 1035.

² Pagan, 17th Jan. 1823, 2 S. 125; see *sup.* page 234.

³ See Stuart, 20th Feb. 1823, 2 S. 226.

⁴ Stobie's Trustees, 12th Dec. 1838, 1 D. 224.

Future creditors.

Where a preference in favour of certain parties is duly constituted, by a trust for behoof of creditors, completed by infeftment in heritage, and intimated assignment in moveables, future creditors of the trustor can only rank upon the right remaining in the trustor, they having no greater interest than remained in him.¹ Yet, in the creditors of Balmaghie *v.* M'Ghie,² an estate was adjudged at the instance of a future creditor, without regard to a previous disposition to a trustee, for behoof of the creditors at large, there being apparently no proper preference created in favour of special creditors. But although their claims are thus postponed till those of creditors, who come under the trust, shall be satisfied, they have still an interest, and, consequently, a right, to enforce the proper conducting of the trust-affairs, and realizing a distribution of the funds, and may, therefore, for that purpose, bring an action of multiplepoinding in their own name, or in that of the trustee, in order to have the claims on the estate ascertained and adjusted, or, if the preference have failed, by transference under the trust-deed having been incomplete, as by the trustor remaining in possession in the case of moveables.³ Where an heritable estate was conveyed to a trustee, for payment of debt, and the trustee sold the property, and applied the price in payment of the heritable debts, but thereafter it was discovered that a part of the estate was not covered by the securities held by the heritable creditors, and the non-acceding creditors, in a

¹ See *sup.* part 1, c. 9.

² 22d Feb. 1749, M. 1211.

³ Gibson, 29th May, 1841, 3 D. 974; Borthwick, 17th Feb. 1829, 7 S. 420; Fraser, 26th June, 1830, 8 S. 982; M'Gill, 21st Dec. 1839, 2 D. 277; and *sup.* page 83.

multiplepoinding, claimed consignation of the value of that part of the estate, as a fund applicable to the payment of the debts generally,—it was held, that the trustee was bound to consign the value of the subjects, and that it was not sufficient to elide this by pleading, that the course of management, and the discharge by the heritable creditors for the price, were, in the circumstance, beneficial, or not injurious to the non-acceding creditors.¹

In regard to diligence subsequent to the execution of a trust for creditors, it is necessary to observe, that posterior to executing the conveyance, the debtor remains proprietor of his land estate, subject to the burden of the trust-right. The trustee, being infest, holds two characters,—first, he is a proprietor or holder of a burden subject to redemption; and secondly, he holds a procurement empowering him to sell the estate, and grant a complete conveyance to a purchaser. After such a sale, and the infestment of the purchaser, the position of parties is altered. Each creditor has a personal claim for accounting and payment against the trustee, and the debtor has a similar personal claim for the reversion, his real right as proprietor being extinguished by the conveyance. Where, therefore, the truster is not so divested of the property, as in the case of extra-judicial settlements of bankrupt estates, or otherwise,² the right of the truster may be adjudged.³

The right of a creditor in a trust-estate being merely a *jus crediti*, or right to bring a personal

Attachment
of trust-
property.
General
position of
parties under
trusts for
creditors.

Legal dili-
gence,
form of
Against
truster.

¹ Mansfield, 8d Nov. 1843, S. J.

² Barbour, 7th July, 1826, 4 S. 806.

³ Campbell, 14th Jan. 1801, M. Adjudication, App. 11; see also M'Millan, 4th March, 1831, 9 S. 551; Aff. 28th June, 1832, S. Sup. 7; see also *s.v.p.* part 1, c. 9.

Against creditors of trust-estate. action, arrestment, and not inhibition or adjudication, is the proper diligence for attaching such property in the hands of the trustee, which will therefore apply both to heritable and moveable property.¹ Thus, where an heritable subject is vested in trustees for payment of legacies, the interest of the legatees may be attached by arrestment.² It has been held, that in the case of heritage, the trustee need not be infest at the date of the arrestment.³ Possession in the case of moveables will of course be necessary, or an intimation of assignments of claim of debt. Diligence against a trustee, as by horning, for recovery of debts due by him personally, is a sufficient warrant for arrestment for recovery of debts due by the trustee and his constituent conjunctly and severally.⁴ By this decision it is held, that, when money is due by a trustee, both officially and as an individual, a decree obtained, and horning raised against him as an individual, may be used as a warrant for arresting the money in his hands *qua* trustee. Where a power is given by a bankrupt to a trustee, to sell his effects for behoof of his creditors, arrestment of the subject, or of the price in the hands of the trustee, so as to disappoint the *pari passu* preference of the creditors, is incompetent.⁵ If a disposition *omnium bonorum* be granted to a trustee for behoof, not of the whole creditors of the disposer, but a part of them, such a trust would be ineffectual to prevent

¹ Grierson, 25th Feb. 1780, M. 759; Wilson, 31st May, 1809, F.; Barbour, *ut sup.*; Broughton, 3d March, 1832, 10 S. 418.

² Douglas, 29th June, 1796, M. 16218.

³ Douglas, *ut sup.*

⁴ Neilson and Rae, 11th Jan. 1745, M. 677.

⁵ Souper, 23d Jan. 1756, M. 744; Stalker, 9th Feb. 1759, M. 745.

Title in trustee.

Against trustee personally, and *qua* trustee.

***Pari passu* preference.**

arrestment in the hands of the trustee at the instance of a creditor who has not acceded to the disposition, as a disposition *omnium bonorum* renders the disposer bankrupt, and consequently he cannot grant preferences. Where a solvent party has assigned a special sum or subject to an individual in trust, to be applied in payment of a particular debt, the fund cannot be effectually arrested in the hands of the intermediate trustee.¹ Arrestment in the hands of a trust-disponee is effectual, although the estate has not been realized or turned into money at the date of the arrestment.² But arrestment in the hands of debtors of a defunct, as debtors to his trust-disponees, while the debts are unconfirmed, are inept.³ Contingent interests from lands and estates in the hands of the trustees, are not arrestable generally, but only termly as they fall due.⁴ It is competent to arrest in the hands of a trustee on the dependence of an action against the truster personally, and the trustee *qua* trustee.⁵ Inhibition on the dependence of an action for malversation against trustees proceeding in the execution of their office, is incompetent, unless upon cause shewn.⁶ Where mismanagement is alleged, suspension and interdict is the proper remedy.⁷

Where there is more than one trustee, in order

*Trust by
solvent party.*

*Estate not
realized.*

*Contingent
interest.*

*Arrestment,
&c. on de-
pendance.*

*Where more
than one
trustee.*

¹ Where the trustees named had died without assigning the beneficial interest in terms of the trust, a creditor of the person holding such beneficial interest was held entitled to adjudicate; Gavin, 30th May, 1826, 4 S. 629, Aff. 17th March, 1830, 4 W. S. 48; and Drummond, 30th June, 1758, M. 16206.

² Kyle's Trustees, 14th Nov. 1827, 6 S. 40.

³ Henderson's Trustees, 20th May, 1831, 9 S. 618.

⁴ Pindar, 27th May, 1824, 3 S. 69.

⁵ Kyle's Trustees, *ut sup.*

⁶ Mylne, &c. 6th March, 1832, 10 S. 490; Hay, 7th July, 1838, 16 S. 1273.

⁷ Hay, *ut sup.*

effectually to arrest in their hands, it is necessary to do so in the hands of each individual trustee, or of a quorum,¹ or to arrest in their hands generally, at a meeting assembled for transacting trust-business. Trustees must be cited *nominatim*, and not merely as the trustees of a certain person.² Where a party deceased was proprietor of an heritable property, in which he carried on a manufacture, it was held competent to cite his trustees before the sheriff of the county where the deceased had lived, where the property lay, and where the managing trustees resided, although the majority of their number personally dwelt in another county, they being cited by letters of supplement.³

**Citation,
Beneficiary.**

It is enough to cite trustees without also citing beneficiaries, as the trustees are bound to support the interests of the beneficiaries.

**Arrestment in
hands of
factor.**

Arrestment in the hands of a factor is not a competent mode of attaching trust-property.⁴

**Parties re-
siding abroad.**

In regard to questions as to the jurisdiction of courts in this country over persons residing abroad, where trusts have been created, arrestment in the hands of the trustee is sufficient in the case of moveables. Thus, where a party domiciled abroad having a right to the liferent of a residuary estate in Scotland under a trust-deed of settlement, executed a disposition in trust thereof *inter alia* for behoof of himself and wife; and an arrestment *jurisdictionis fundandæ causa* was thereafter executed in the hands

¹ Black, 22d Jan. 1830, 8 S. 367.

² Bell, 2d Jan. 1841, 3 D. 380. See also Brown, 9th July, 1830, 8 S. 1031.

³ Black, &c. 18th Dec. 1827, 6 S. 261.

⁴ See Muirhead, M. 732; Donaldson, 18th Jan. 1709, M. 733.

of the trustee named under the deed of settlement,— it was held, that the arrestment was sufficient to found jurisdiction against him.¹ But a trust-assignee using such arrestment, must do so in the name of his constituents individually.²

Where a bond has been assigned to an individual as trustee for creditors, and the truster and trustee have both died, the creditors are entitled to pursue for payment of the bond.³

¹ Rigby, 18th January, 1833, 11 S. 256.

² Bentrams, 6th March, 1821, F.

³ Lady Pitmedden, 18th December, 1707, M. 7727.

CHAPTER IX.

DIVESTING AND DISCHARGE OF TRUSTEES, AND VESTING OR RE-INVESTING OF THE TRUST-ESTATE IN THOSE HAVING THE ULTIMATE RIGHT THERETO.

Heirs of
trustee.

WHERE a trust has come to an end by the death of the trustee, where only one existed, his heirs or successors may apply to the Court for the appointment of a judicial factor, to superintend the trust-affairs, in order that their interest may be attended to in adjusting and winding up the trust-business. Thus, where a trust had fallen by the death of a trustee, who had made considerable advances in the course of the management, and who, under the trust, would have been entitled to have retained the trust-estate till relieved of these, the Court, on the application of his widow and executrix, appointed a judicial factor to carry on the trust, notwithstanding the opposition of a creditor infest.¹

Where an action had been originally raised at the instance of certain trustees and beneficiaries against other trustees, and, after the death of the trustees, pursuers, the action had come to be validly insisted in at the instance of the beneficiaries, — it was

¹ Sheriff, 24th Jan. 1829, 7 S. 314.

held not to be necessary that appearance should be made for the representatives of the trustees who were the original pursuers, as being personally interested in the finding of expenses, which had been awarded against the pursuers in general terms.¹

In order to bring trusts to a conclusion, it is necessary, 1st, That the duties of the trust shall have been fully performed; and 2d, That the purposes of the trust shall have been fulfilled strictly in terms of the deed of constitution; or in so far, at least, as these are capable of being performed. If a trust shall contain purposes which prove incapable of being performed, the proper course to be adopted is to apply to the Court for an exoneration and discharge from these duties, and from the trust generally.

Where the purposes of the trust are completed, and all the parties interested agree to the winding up of the trust-affairs and exoneration of the trustee, this may of course be done by a regular written discharge. But the trustee must see that all those interested sign the discharge, for, in the case of a body of creditors, a discharge by a majority would not be sufficient. But if the beneficiaries shall refuse to exonerate the trustee extra-judicially, or be incapable of exonerating him from minority or otherwise, the proper course is for the trustee to raise a process of multiple-poinding, concluding for exoneration, at the same time tendering a regular state of the trust-affairs, which action is competent, notwithstanding that the trustee has not been exposed to actual double distress.² And although a co-trustee, or co-trustees, should refuse

Requisites for exoneration.

Consent of parties interested.

Multiple-poinding.

¹ Darling, 20th November, 1841, 4 D. 48.

² Taylor, 24th May, 1836, 14 S. 817.

to concur, or disclaim after it has been raised, still it is competent for a single trustee to insist alone to the effect of obtaining his own discharge.¹ Where there is only one claimant, the proper form is an action of declarator of extinction of the trust, and of exoneration. It is with a view to the danger and effect of partial exoneration, that the form of multiplepoinding is of importance, the nature of which is this:—By the form of count and reckoning, the trustee may be subjected to repeated accountings; for it is not enough to say, that in an accounting with another party, a full state of the affairs of the trust has been produced, and exoneration been obtained, for that exoneration is only effectual *quoad* that particular claimant. But by raising an action of multiplepoinding and exoneration, calling all parties interested to appear for their individual interests, and producing his accounts, the claims of individuals will be arranged, and the trustee exonerated, after which no claims can be brought against the trustees by parties so called, their only recourse being against the co-claimants on the estate, who have been preferred in consequence of their having given in their claims. The only risk to the trustee is from claims by parties who have been omitted to be called; strict inquiry must therefore be made as to all having interest or pretensions, in order that they may be convened. The duties of trustees in regard to preferences have already been treated of.² Where the claimants are few, their claims specific and undisputed, and the estate sufficient, there can be no risk; but where the amount or sufficiency of claims, or number of claim-

¹ Ibid.

² See *sup.* page 23, *et seq.*

ants, is doubtful, and where the trust is expressly for behoof of creditors, partial discharges are wholly insufficient, and to be avoided, as the trustee will in such case be primarily liable for the amount of preference, and will only have recourse against the party who has been so preferred *in quantum lucratus*.

A trustee, therefore, cannot be forced to make payments of special claims until a general accounting shall have been gone into, and a decree of exoneration and discharge obtained.¹ With a view, therefore, to obtaining a final discharge, trustees must be aware of the effect of current obligations, during the existence of which no full discharge can be obtained; and indeed it would not be safe to accept of such, as, although a beneficiary may give a full discharge, it will only be effectual so far as his individual interest is concerned, and provided that there be no acknowledgment of claims unliquidated still remaining. Thus, where trustees, holding an entailed estate under condition that they should only denude in favour of the heir, when the whole debts affecting the estate were extinguished, denuded while debts remained unpaid, and procured a discharge from the heir, stating that they had retained funds to meet the debts, it was held, on these debts being demanded from a succeeding heir, that he was entitled to decree of relief against the trustees and the representative of the heir in whose favour they had denuded.² And, in like manner, where the managing trustee under a deed of settlement, at receiving a discharge of an action of count and reckoning, granted a letter to

Competent
discharge.

¹ Elliot's Trustees, 8d July, 1828, 6 S. 1058; S. C. 10th July, 1829, 7 S. 892.

² Fraser, 8th Dec. 1826, 5 S. 104.

the pursuers, declaring that certain claims against his brother, another of the trustees, were not settled, and should be determined by submission, it was held, that both these parties were accountable under that letter.¹ Where, however, there is produced a full state of the trust-affairs, and of all claims, although there shall be one or more claims of a definite amount still existing against the estate, the Court will, if it thinks fit, grant a discharge, at the same time authorizing the trustee to retain funds or securities sufficient to liquidate these claims. Where a party conveyed his property to trustees, with instructions, *inter alia*, to pay to the children of his daughter certain provisions, subject to the mother's liferent, when the youngest of the children should attain majority—the youngest of the existing children having attained majority, and the mother being forty-eight years of age, and not having borne a child for twenty-six years,—it was held, that the children were entitled to payment of their provisions on securing their mother's liferent, and finding caution for the contingency of another child being born.² So, also, trustees are entitled, before denuding, to a discharge of annuities payable out of the trust-funds, or to retain sufficient funds to answer them.³ Trustees must, as already said, be careful to invest the trust-funds strictly in terms of the deed, and ought on no account to leave funds in the hands of a co-trustee or factor, after raising the process of exoneration.⁴

¹ Graham, 15th June, 1827, 5 S. 806.

² Scheniman, 25th June, 1828, 6 S. 1019.

³ Scheniman, 3d July, 1832, 10 S. 759; and Shaw, 6 S. 1149; Watt, 18th Feb. 1825, 3 S. 544.

⁴ See Duties, Liabilities, and Protecting Clause.

Once undertaken, the office of trustee cannot be thrown up at the will of the trustee.¹ Nor will the resignation of that office, if competent, be presumed from any thing but the most positive declaration of resignation.²

Resignation
of office,
when com-
petent.

Erroneous impressions have frequently arisen with regard to the power of trustees to resign their office, and of the Court to interfere for the purpose of exonerating trustees, prior to the purposes of the trust having been fulfilled, in terms of the trust-deed of constitution and conveyance—which appear to have been caused by the supposed analogy of the English law as to this subject: it may, therefore, be necessary to state the principles applicable to such questions in the law of Scotland.

The principles on which this question, and that as to the power of the Court to appoint new trustees, depend, are precisely similar. Trust, by the law of Scotland, is a contract, by the acceptance of which, the party intrusted becomes bound to perform certain acts or duties—which contract is as binding on the acceptor as any other known in law; for although, on the one hand, it be a gratuitous office, undertaken for behoof of the trustee, and not of the acceptor, yet it is freely and voluntarily undertaken and accepted, and on that acceptance the party constituting places, and is entitled to place, implicit confidence, and from the non-fulfilment of its duties, he or his representatives may suffer serious injury. A court may

¹ Logan, 26th May, 1843, 5 D. 1066; Carstairs, 20th Jan. 1776, 2 Hails, 678; Lyndoch, 15th Feb. 1827, 5 S. 358; Aff. 4 W. S. 148, S. C. 20th Nov. 1832, 11 S. 60; Cumming, 28th Feb. 1834, 12 S. 508; Milne, 23d Nov. 1843, 16 S. J. 87. See also *susp.* page 210.

² Freen, 28th June, 1832, 10 S. 727; S. C. 29th Nov. 1833, 12 S. 141; Cowan, 20th Jan. 1837, 15 S. 398.

determine as to the respective interests of parties under a contract, but it cannot, for any personal reason, or supposed equity, interfere with, or in any way annul, a contract, as a matter of right in all parties interested in its fulfilment, when it is valid according to law. It may, therefore, exoner and discharge a trustee, where his duties have been fulfilled, or where he has come to be in such a position, that he cannot fulfil the conditions of the obligation undertaken by him, where it is imperatively necessary that his place should be supplied, or where he has become legally disqualified, and not where it is merely personally inconvenient for him to continue to perform those duties; for there is a great difference between providing for legal and other *necessary disqualifications*, and the exercise of a supposed equitable power of interference. It is upon this principle, of its being a contract or obligation, that the Court cannot appoint new trustees, or, indeed, interfere with the constitution of the trust in any way, unless in cases of absolute necessity, for securing the fulfilment of the trustor's intention; and that, therefore, in providing for such deficiencies, it appoints a person of a different character,—namely, a judicial factor or manager. And, moreover, practically, the Court could not interfere without infringing upon constituted right and obligation. It could not interfere to exoner a trustee where only a quorum has accepted, for, by doing so, it would defeat the intention of the trustor, and the obligation which the trustees have come under to him. Nor would it less interfere in point of principle, or as regards ultimate consequences, where more than a quorum have accepted; for one great object of appointing several trustees, is to pro-

vide for non-acceptance and failure of those appointed, which must be defeated by interference by the Court discharging individual trustees during the subsistence of the trust. Nor could any power of substitution, to the co-trustees under the deed, provide for such; for the exercise of such power is only competent in cases of positive necessity, and not in cases of interference, or views of equity such as this; for instituted trustees must always be preferred to such as are merely substituted in virtue of a power. The analogy of English law, if differing from the law of Scotland in regard to this point, is of no authority in a question of right such as this; and, moreover, there is a broad distinction between the position of parties under the two laws, for the equitable interest or right of the beneficiary is much more extensive, and the estate and office of the trustee proportionally more limited, under the law of England, than under that of Scotland. There is no such vested equitable estate in Scotland, and, therefore, no such extended power of appointing or discharging.

By the law of England, it is a rule, without any exception, that a person who has once undertaken the office, either by actual acceptance or construction of law, cannot discharge himself from liability by a subsequent renunciation. The only mode in which he can be released, is either in virtue of a special power in the trust-deed, by consent of all interested, or by authority of a court of equity.¹ The nature of

¹ Doyle *v.* Blake, 2 Sch. and Lef. 245; Chalmer *v.* Bradley, 1 J. and W. 68; Reid *v.* Truelove, Amb. 417, and L. on T. 227; Hamilton *v.* Fry, 2, Moll. 458; *ex parte* Anderson, 5 Ves. 243; *In re* Anderson, Id. 29; — *v.* Osborne, 6 Ves. 455; — *v.* Roberts, 1 J. and W. 251; Coventry *v.* Coventry, 1 Keen, 758; Pickering *v.* Lord Stamford, 2 Ves. Jr. 280, 582; Morse *v.* Royal, 12 Ves. 374, 377.

the equity jurisdiction is thus stated by Lord Langdale, in *Greenwood v. Wakeford*:¹— “ If a trustee undertakes the performance of a trust, he is not entitled, as against the estate he has undertaken to protect, to exercise a mere caprice, and, without any assignable reason, say that he will no longer continue a trustee. On the other hand, if the trustee finds the trust-estate involved in intricate and complicated questions, which were not, and could not, have been in contemplation at the time when the trust was undertaken, he has, in consequence of that change of circumstances, a right to come to the Court to be relieved ; and the Court will judge whether the circumstances were such as to make it fair for him to decline acting longer upon his own responsibility.” The law of England, therefore, as viewed by Lord Langdale, does not differ in this respect from the law of Scotland;² for the general principle of both laws is, that trustees cannot be exonerated from the duties of their office, unless under very peculiar circumstances. This has at all times been understood to be the law of Scotland, and, for the reasons above stated, as to the substitution of trustees, and as to its being a contract or obligation, it necessarily must be more strict in Scotland than in England. Viewing it in its true light of an obligation, if from circumstances a trustee shall come to be in a position differing wholly, or nearly so, from that in which he had reason to suppose he would be at the period of his acceptance of the office, or in which the trustor intended he should be, he would undoubtedly be

¹ 1 Beav. 581.

² See, however, *Stermitt v. Bainbridge*, M. R. 9th May, 1837, and *Howard v. Rhones*, 1 Keen, 581.

entitled to apply to the Court to be relieved from the burdens of an office which he had never actually undertaken. But if the office do not differ, in a very material manner, from that actually undertaken by him, the Court evidently cannot relieve him from the obligation to perform its duties. Where a trustee has become a party to an action, in his capacity of trustee, being thereby responsible to a third party, he cannot withdraw from the action, notwithstanding the beneficiary be sisted as party in his place, unless with the consent of the third party.¹

Where beneficiaries, or others interested, are desirous of having a trust brought to an end, or to have trustees called to account, and discharged, in consequence of suspicious or improper circumstances connected with the conducting of the trust-affairs, this may be done by an action of count and reckoning. If that action is not so framed as to include all claims, and thus exhaust the whole matter, the trustees ought to raise a counter-action of multiplepoinding. Although the Court will not readily, and without sufficient cause being shewn, interfere to remove a party from the office of trustee, who has been placed there in consequence of confidence reposed in him by a private party, (the truster,) still it will so interfere, where protection to the estate is evidently necessary, from the conduct of the trustee, particularly in the case of minors being beneficiaries.²

When the trust is supposed to be brought to a

Discharge at
instance of
beneficiaries,
&c.

¹ Stephenson's Trustees, 11th March, 1823, 2 S. 287.

² See Wotherspoon, 15th Dec. 1775, M. 7450. See Powers of the Cour sup. page 206, *et seq.*

regular conclusion, if there are several competing claimants, an action of multiplepoinding may, in the first place, be brought in name of the trustee by any party interested. And it has been held, that this process is not incompetent merely in respect that a party is clearly preferable to the fund *in medio*.¹ But it is, of course, not to be resorted to on frivolous grounds, where there is no actual double distress, that is, no competition between rival claimants.² If there be landed property, and only one claimant, or no competition where there are several claimants, a declarator of extinction of the trust, concluding for adjudication, may be raised, if necessary, to declare the trust at an end, and adjudge the estate, in respect, and in terms of, the original deed of conveyance, on which confirmation may be obtained from the superior, and infestment taken. Where not inconsistent with the terms of the trust-deed, it will in any case be sufficient, if the whole parties interested agree, to bring the trust to an end, although there be no special provision to that effect in the trust-deed.³

**Disqualification
of
trustee.**

The general rule, of course, is, that whatever will disqualify a party for taking the office of trustee, will disqualify him from continuing to hold it.⁴

**Assignment
by bene-
ficiary.**

Where the beneficiary has the *jus crediti*, as he has a right to compel the trustee to convey lands to him, and denude in his favour, so he may also, without making up titles, assign that right to others, who,

¹ Sandilands, 30th May, 1883, 11 S. 665 ; Dixon, 5th March, 1883, 11 S. 517.

² Middleton, 21st Dec. 1843, 16 S. J. 173.

³ Bruce, &c. 28th June, 1833, 11 S. 799 ; Craigie, 17th June, 1837, 15 S. 1157 ; Shaw, 6 S. 1149.

⁴ See *sup.* part 2, c. 1 ; and page 138, *et seq.*

in virtue of the *jus crediti* so assigned, may bring an action against the trustees or their successors, to fulfil the purposes of the trust.¹ Thus, by conveying the estate to trustees, for behoof of a party in life-rent, and the unborn child of that liferenter in fee, the fiar is not under the necessity of making up a title, by service, as heir of provision to the property, his personal claim against the trustees to convey to him being sufficient to enable him to obtain possession. And, therefore, if the beneficiary have died without obtaining a conveyance, or assigning his right, his heir will have, of course, the same right of action on expediting a general service.

Where the trust is brought to a conclusion by the exoneration or death of the trustee, there is no need of a conveyance by him to the beneficiary, where the conveyance is in the form of a trust *in gremio* of the deed; for the special conveyance, interest, or purpose being at an end, the beneficiary will serve heir to his author, the trustee, in virtue of the conveyance in the deed, to take effect after the purposes of the trust shall be concluded, notwithstanding that the trustee may have been infest. But where the trust is in the form of an absolute disposition and back-bond, and not to the heirs and successors of the trustee, and the trustee has been infest, a conveyance is necessary. Or, where he refuses to denude, the beneficiary may adjudge in implement of the trust. So, also, where the trust is to the trustee, his heirs, or successors, and they refuse to accept, or where simply to the trustee, and not to his heirs, &c., and the trust is in the form of an absolute disposition

Death of
trustee.
Title of bene-
ficiary, how
completed.
To heritage.

¹ Gordon, 4th Dec. 1821, 1 S. 185; Creditors of Aytoun, 7th July, 1784, M. 9732.

and back-bond of trust, and they are unwilling to accept or represent in consequence of the liability which might thereby be incurred, the beneficiary may adjudge in implement of the back-bond.¹ Thus, where a title to property was taken to two parties, and the survivor, in trust for the heirs of the predeceaser, and the survivor got a degree of declarator, finding the trust at an end, and of adjudication in his favour, it was held, that this was a correct mode of vesting the absolute right in the survivor, and that a service as heir of provision was not required.²

In moveables. If the property be moveable, adjudication proceeding on declarator is the proper form, the trust being at an end. On the failure of the trustee, the right reverts back to the trustor, or through the trustor to his personal representative, who, if he adopts the succession in moveables, takes it clothed with the trust, and is bound faithfully to administer it for behoof of all interested,³ and may, therefore, as executor, have judicial authority interposed, and himself exonerated, where there are conflicting claims. If the heir in moveables reject the trust, the beneficiary may obtain himself confirmed executor *qua* creditor, and proceed to fulfil the purposes of the trust, and pursue actions where such are conveyed by the trust.⁴

Copartnery trusts. In copartnery trusts, a party who has held the office of trustee may, notwithstanding a general discharge as trustee, be bound to concur in discharges

¹ See Dalziell, 11th March, 1756, M. 16204; Drummond, 30th June, 1758, M. 16206; and Kames' Prin. Eq. 321, 4th ed.; Crawford, 22d May, 1838, 16 S. 1017.

² Gillepie, 11th March, 1824, 2 S. 795.

³ Gavin, 30th May, 1826, 4 S. 629, 4 W. S. 48.

⁴ Clephane, 30th May, 1836.

of contracts or obligations undertaken during the subsistence of his office, and to which he individually, though only *qua* trustee, was a party. But, in doing so, he is not bound so to act in the capacity of trustee at the period of such concurrence or discharge, or to give more than the special warrandice undertaken at the period of entering on the contract, or rendered legally necessary thereby.¹

Where a back-bond of trust is found in the repositories of a trustee after his death, the legal presumption is, that the trust was discharged.²

¹ See Stewart, 21st Nov. 1837, 16 S. 86.

² Charteris, 7th June, 1712, M. 11413. As to the validity of a discharge, see Kyle, 23d Nov. 1832, 11 S. 87; Blyth, 2d March, 1833, 11 S. 512.



P A R T I V.

**OF THE OFFICES OF FACTORS AND OTHERS
UNDER TRUSTEES IN TRUSTS FOR
PRIVATE PURPOSES.**

CHAPTER I.

OF THE OFFICES OF FACTORS AND OTHERS UNDER
TRUSTEES IN TRUSTS FOR PRIVATE PURPOSES.

FACTORS and agents generally, in trusts for private purposes, are usually appointed by the trustees, the power of selection being in general left entirely to them. And the nature of these offices, when constituted, is, that on the one hand the party appointed has no lien over the trust-estate, but a claim upon the trustee only;¹ whilst on the other hand he is responsible to the trustees alone, and not to those interested under the trust.²

There is no legal restriction as to the person who may hold the office of factor; but there are certain circumstances which disqualify individuals from holding that office with the same advantages which attend a party chosen, as being altogether unconnected with the trust-affairs. Thus, in regard to the appointment

¹ See Eng. Ca. of Worrall *v.* Hanford, 8 Ves. 4; Lawless *v.* Shaw, L. and G. 154, rev. 5 Cl. and Fin. 129. This does not exclude the factor from retaining his whole charges as factor out of the balance of trust-funds accounted for by him.

² See Eng. Ca. Myler *v.* Fitzpatrick, 6 Mad. 60, per Sir J. Leach; and see Keane *v.* Robarts, 4 Mad. 350; but see Pollard *v.* Downes, 1 Eq. Ca. Ab. 6; Davis *v.* Spurling, 1 R. and M. 64, S. C. Taml. 199; Crisp *v.* Spranger, Nels. 109; Saville *v.* Tancred, 3 Sw. 141, note; Nickolson *v.* Knowles, 5 Mad. 47; Fyler *v.* Fyler, 3 Beav. 550.

of one of several trustees to be factor or cashier under the trust, the Lord Chancellor, (Cottenham,) in the case of *Home v. Pringle*,¹ in which it was maintained, that the appointment of one of the trustees to be factor, was of itself a breach of trust, and subjected the trustees to all the consequences resulting from it, observes, "It is said, that there is a difference between the law of England and of Scotland. In England, the appointment by trustees of one of their body, to act exclusively in any part of the trust, under the authority of all, would, as to the others, have the effect of making the trustees appointing responsible for the act of the one appointed — that is, they could not treat acts done or sums received by such appointee, in the character so conferred upon him, as the acts and receipts of a co-trustee, for which they, as co-trustees, would not be liable, but as acts and receipts of their agent, for which they would or would not be liable, as there might be proof of culpable neglect in their dealings with such agent. The allowance of a salary to such appointee would clearly be a breach of trust, and would, therefore, be disallowed.

*According to
the law of
England.*

*According to
the law of
Scotland.*

But it is said that the practice, if not the law of Scotland, sanctions such appointment; and the case of *Montgomery v. Wauchope*² is referred to in proof of that proposition. Nothing was decided, in that case, upon that point; but the Judges stated, that such appointments were not inconsistent with the law of Scotland, and that a trustee appointed by his co-trustees was entitled to the usual remuneration

¹ 22d June, 1841 ; 2 Robinson's Ap. Ca. 384.

² 4th June, 1822, F. and 27th March ; 29th April, 1. 8. 1816, 4 Dow, 109.

of an agent or cashier. This is the real question, because it is not necessary to hold that the appointment is illegal, in order to maintain the principle, that the party who, having accepted the office of trustee, which, unless otherwise provided for by the trust, must be performed gratuitously, accepts another office inconsistent with that of trustee, shall not be permitted to derive any emolument out of the trust-property in respect of such employment. That the office of trustee and of factor or cashier to the property are inconsistent, cannot be disputed. If the execution of the trust require such appointments, it becomes the duty of the trustee to exercise his discretion and judgment in the selection of officers, and his vigilant superintendence of their proceedings when appointed—all which is lost to the trust when a trustee is appointed to the execution of those duties. Therefore the Courts of Equity, in England, in such cases, refuse to the trustees any remuneration which would come to others from the appointment, which produces the salutary effect of deterring trustees from making such appointment when not actually required, and, when such necessity exists, preserves to the trust the superintendence and control of the trustees over the officer they may appoint. I should be sorry to give any sanction to a contrary practice in Scotland. There can be no reason for any difference in the rule upon this subject in the two countries. The benefit of the rule, as acted upon in England, is not disputed, and as there is no decision to the contrary, there cannot be any reason for sanctioning a contrary rule in Scotland."

His Lordship farther observes, "In England, the appointment of one of the trustees to act as receiver,

and manage the property, and collect the rents, would not, *per se*, make the other trustees responsible for his acts, but it would make the trustee so appointed the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts and receipts of a stranger appointed to such office, but not otherwise ; and in Scotland, where such appointments are treated with more indulgence, the consequences cannot be more stringent. It appears, indeed, from the cases of *Sym v. Charles*,¹ *Moffat v. Robertson*,² *Ainslie v. Cheape*,³ and *Dean v. Paterson*,⁴ that the Court of Session have acted upon this principle."⁵ And again, in regard to the allowance of a salary, observes, that "if that question had arisen for decision, in a proper form, and under circumstances calling for a judgment upon the point, whether a trustee can create an office for himself out of his trust, so as to derive profits from his trust ? I should have had great difficulty in assenting to what appears to have been assumed rather than decided in Scotland."⁶

Where a co-trustee appointed factor, trustees liable as for an agent.

It would therefore seem that it must be held, from this opinion, that the appointment by trustees of one of their number to be factor to the trust, is not a breach of trust, so as, *per se*, to make those appointing liable for the acts of the factor, as if the acts of a co-trustee, for which they would be liable, but will

¹ 8 S. 741.

² 12 S. 369.

³ 13 S. 417.

⁴ 14 S. 361.

⁵ See also *Seton v. Dawson*, Append. where it was held by some of the Judges, that, as regards the liability of co-trustees, there is no difference between the case of a mere acting trustee and that of one actually appointed as factor.

⁶ See also opinion of Lord Chancellor Eldon in *Montgomery v. Wauchope*, *ut sup.* and *Seton v. Dawson*, Append. Lord J. C. Hope.

infer against those appointing a liability for the acts, as if those of their agent; but that trustees ought not to have any allowance or salary in respect of offices held by them under the trust. Appointment of trustees to offices under the trust, with salary.

This is a subject of very considerable importance in the law of Scotland; for, let it be observed, that, if the rules of the courts of equity in England shall be adopted into our law, as is implied in the observations of Lord Cottenham, the result is, that a party who has been appointed a trustee, and has accepted of that office, is disqualified from holding *any* office under the trust, from which *emolument is to be derived*. Of this it can only be said, that it is the introduction of a new principle into our law, or rather, as it would seem, into our practice. For the undoubted law of Scotland, as established by immemorial usage, at least, has been, to look upon the personal trust or confidence, in this respect as well as others as conferred by a trust-deed, in the most liberal and extensive light consistent with actual safety. And there are most material distinctions to be made with regard to the nature and extent of the confidence conferred by the subsidiary office. Thus, there is a very important circumstance in regard to the appointment of a trustee, to conduct the routine affairs of the trust, in the capacity of trust-factor, in which the effect of such appointment, with a salary, must be to give that salary for the performance, in detail, of the same duties which, but for the indulgence granted by law, in allowing the appointment of a factor in cases of necessity, must be performed by the party or parties accepting of the office of trustee. It is therefore difficult, in this respect, to draw a distinction between trust and factory, unless in the

case of a stranger appointed. This also applies, in a great degree, to the office of cashier under the trust. But it does not apply to the case of a law agent; and the only restriction which can arise in that case, must do so from the policy of the law in excluding trustees from that office; for the duties are not subsidiary, but distinct. The policy of equity in England creates a disqualification. The law, or at least the immemorial practice and character of trusts in Scotland, has not done so. Indeed, it may be said to have been a common custom, or even rule, in practice, to include the name of the family agent in trusts of importance and otherwise, to give advice, and attend to the formal and regular conducting of the trust-affairs; and such has seldom, if ever, been looked upon as a disqualification for holding any office under the trust, but more generally the reverse, as being a proof of the trustee's confidence, and least of all for that of law agent.¹ Although the policy of the general rule of the English law, in excluding trustees from holding any office under trusts, from which they are to derive emolument, is most sound and equitable, yet it is proper here to state, that, in this respect, the practice in Scotland at least has differed. The reposing of implicit reliance in a factor by trustees, and, indeed, of any trust beyond that of a mere manager, is to be positively deprecated, and this is more likely to occur in the case of a trustee acting as managing trustee (a term

¹ See Colvil, 16th Feb. 1839, 1 D. 526; Rattray, 19th Feb. 1828, 6 S. 568; Mackenzie, 27th May, 1829, 7 S. 659; Johnson, 21st June, 1834, 12 S. 770; Allan, 3d June, 1842, 4 D. 1357; Tod, 27th May, 1842, 4 D. 1275; Adam, 24th December, 1842, 5 D. 391; Sym, 13th May, 1830, 8 S. 741; Hadaway, 25th May, 1830, 8 S. 800; Bremner, 13th Dec. 1837, 16 S. 213; Mackenzie, 14th June, 1831, 9 S. 730.

of the most dangerous nature) or actual factor, than any other, and therefore is to be discouraged. Again, the allowance of a salary to a trustee from the trust-funds, in whatever capacity, is also a very doubtful matter, for one great object or principle, which will ever be acted on by courts with the utmost vigilance, is, to prevent jobbing in the case of trusts under any form. For the holding of lucrative offices, or deriving of emoluments from trusts, is undeniably but little consistent with their vigilant superintendence and speedy termination. But although the general rule in the law of England is, as above stated, that a trustee cannot derive emolument from his office, either as solicitor, attorney,¹ or otherwise,² it would not seem to be an invariable rule, to the exclusion of the allowance of a salary to a trustee employed by his co-trustees in the capacity of agent, in consequence of his being the person best acquainted with the trustee's affairs.³

The true position of the matter seems to be this. The amount of confidence actually reposed in trustees in Scotland, has been such as to give rise to the understanding, that the office of trustee, and the subsidiary offices under trusts, are in a great degree identical—an error partly arising from the appointment to these offices being in the trustees, and from those appointed being responsible to the trustees alone. But the great source of error in this, as in many other matters of practice in trusts, has been want of investigation of the principles and practical

¹ *New v. Jones*, Excheq. Aug. 9, 1833, 9 Jarm. Prec. 338; *Moore v. Froud*, 3 M. and C. 46; *Fraser v. Palmer*, 4 Y. and C. 515; *Collins v. Carey*, 2 Beav. 128.

² See *susp.* 113, *et seq.*

³ See *Marshall v. Holloway*, 2 Sw. 432.

working or machinery of trusts, as it may be termed. Let it be observed, that the leading feature and object of trusts is superintendence, and not mere management. Provision for management is made over and above, but subsidiary to the trust, and under its absolute control and superintendence. It is a plain and evident proposition, therefore, that a body cannot superintend itself, or even its own members, where acting in matters other than those which are the immediate occupation of the whole body. And so it is, that, when the conducting of the details of the duties of the body is left to a part of that body, the superintendence is supposed to be less necessary, and therefore the management comes to be placed in a worse position than it would otherwise be; and all in consequence of the supposed, or perhaps, in many instances, actual confidence, specially conferred. But as this is not by any means the universal rule, but matter of individual confidence specially reposed, it cannot be a rule of law: it, therefore, is a practice which ought not to exist. No doubt, it is a wholly different matter where these offices are really intended to be combined in the same party or parties, as trustees holding the office of factor, cashier, law-agent, &c. and such is *actually expressed*; for the trustor is entitled to make such regulations as to the constitution of the trust, as he shall think fit. But such ought to be positively expressed in the deed, and not left to the judgment of the trustees, who, from the parties being part and parcel of their own number, necessarily have no alternative. Thus, the matter comes to rest on, and be affected by, the general rules of the law, which necessarily looks with much jealousy on such proceedings. The adoption

of inexplicit terms or provisions in trust-deeds, as to the appointment of trustees to offices under trusts, or leaving it to a supposed discretion in the trustees, which cannot properly exist, amounts, therefore, to loose or defective professional practice in conveyancing. But again, let it be observed, that another practical difficulty attends the matter, namely, that it ought to be a general rule in every trust, that the appointment to the offices under it ought to be in those who are responsible for the parties appointed, namely, the trustees; and the combination of the two offices must therefore be incompatible with this. It therefore amounts practically to this, that the party or parties who is or are most suitable for the offices under the trust, ought not to be members of the trust; or if they are nominated as trustees, they ought to resign the former office on assuming the latter. The rule that the office of trustee must be liberally interpreted, is a just and sound rule, but it must be properly applied. Its true intention is to this effect, that they, as undertaking a gratuitous and friendly office, must not be unnecessarily hampered in the execution of it — that is, as regards the nature of their powers; but that refers to their superintendence, and not to any thing beyond their proper office of trustee, which in its nature is wholly gratuitous.

With regard to the special office of law agent in ^{Law-agent} trusts, whilst, on the one hand, its duties are so distinct, that an allowance for these, and an allowance for what are neither more nor less than the details of trust-duties, are quite distinguishable; on the other hand, the great objection of pecuniary interest applies with full force, whilst the plea of

delectus cannot be said to apply, for professional eminence, qualifications, and the special confidence incident to trusts, are not necessarily equivalent: and, by such an appointment, the trust loses the advantage of the aid and advice of a mere professional third party. And again, although, from the opinion of Lord Cottenham, in the case of Home v. Pringle, it would appear that the trustees would not be more liable for the acts of a co-trustee acting in the capacity of law agent, than for the acts of any other party acting as such, (for such would seem to be the inference,) yet, from the same opinion, it is clear, that he would not be entitled to be remunerated as a professional third party, unless, of course, under a special appointment by a provision in the trust-deed.

Appointment
of beneficiary
as factor.

It is very common in practice to appoint the beneficiary to be factor on the trust-estate. Such an appointment is a very proper one, and perhaps the best which can be made where the party so appointed is the sole party having an interest as beneficiary; but it is a very hazardous appointment where there are other, and in all probability in some degree at least, competing interests to be attended to, in which case it is of course for the interest of the trustees to place that office in the hands of a neutral party. The appointment of an interested party to that office is akin to the appointment of the trustee in a trust for creditors, on the supposition that it may be of advantage to have the assistance of the party chiefly interested, and necessarily most intimately acquainted with the state of the trust-affairs, a course which ought never to be allowed to take place, either actually by appointment, or con-

Appointment
of trustee as
factor.

structively by the trustees availing themselves of his services, by employing him in the transacting of trust-affairs, or tacitly allowing him to continue business connections for behoof of the estate.¹

The proper and regular form of appointing a <sup>Form of
appointment.</sup> trust-factor, is by a deed of factory granted by the trustees, conferring on the party appointed such powers as the special circumstances of the trust shall demand, which in a great degree form the measure of his liabilities. Such factories differ but little from ordinary factories for the management of property of a similar character to that in question, the rule being, that the powers or authority given to such factors ought never to be greater than that given to factors in general; but, on the contrary, they ought for the most part to be more restricted in their terms, as trustees will seldom be inclined, or indeed justified, in giving such powers as a proprietor might in special circumstances be inclined to give, as any thing more than mere powers of conducting details amounts in so far to a devolution of their own duties as trustees, in whom alone reliance for discretion is reposed by the trust-deed.² It however frequently occurs, that the trustees merely allow one of their number, who, from business habits or otherwise, is better qualified to conduct the business of the trust, to take the active management without any formal act of appointment, and whose actings are, as has already been observed, binding on the trustees generally, where not expressly disavowed by them in due course.

¹ See Murray, 28th November, 1827, 6 S. 147; and *sup.* page 268.

² A form in use, and which seems suited for the purpose, will be found in the appendix.

Nature of the
office and du-
ties of factor.

The duties of the factor must of course depend on special circumstances connected with the party appointed, and the terms and object of his appointment, and *quoad ultra* he must be guided by the rules as to the powers and duties of trustees, and by the rules of factory or mandate generally. Thus, he cannot retain funds in his possession *qua* trust-factor, for the payment of debts due to himself apart from his office, in competition with other creditors of the trustee.¹ These duties may be of three kinds, management, distribution, or sale, the superintendence of the details of which are the special object of the appointment of the factor. One of the most important kinds of factory of this class, is that in the case of the extrajudicial settlement of bankrupt estates. In all of these the general rules as to trust are the rules as to factory.² The terms and conditions of the appointment are either that of simple factory, or factory with the full powers of the trustees, or nearly so, subject, however, to the control of the trustees, as no trustee can delegate his powers. In the first of these, mere management is under the immediate direction of the trustees; in the second, greater latitude is allowed, and more confidence given, as of doing what would otherwise be the peculiar office of the trustees themselves, as of letting, selling, distributing, &c., requiring, therefore, the exercise of discretion. It ought ever to be observed as a general rule by factors, that it can seldom, if ever, be for their

¹ Creditors of Stewart, 16th July, 1709, M. 2629. See *sup.* page 445.

² Thus, it has been held in England, that the rule against purchasing the trust-property applies to an agent employed by the trustee for the purposes of sale, as strongly as to the trustee himself; *Whitecomb v. Minchin*, & *Mad.* 91.

advantage to claim to themselves more latitude in conducting the details of the trust-affairs, whether more or less generally or extensively intrusted to them, than is absolutely necessary for the management of them; it is the peculiar department of the trustees to superintend and direct in such matters, the carrying into execution of the course determined on being the proper province of the factor.¹

The first thing to be done with a view to the factor entering on his office, ought in every case to be the preparation by the trustee or his law agent of a state of the extent, nature, and liabilities of the trust-property, with a view to provide, in the first place, for the discontinuance of liabilities, whether from securities or other burdens, trading connections, &c., taking investiture, and ascertaining of liabilities attending it, intimation of transference to debtors to the estate, giving up of inventories with a view to representation, adjusting of claims of creditors, and preparing, for the inspection of all concerned, the nature and extent of the estate, and adjusting the proper investiture of funds, and periodical payment of interest and dividends, &c. A rental, or state of the property as put under the control of the factor, is then made up in order to form his guide in accounting. And in conducting the business of the trust, it is the imperative duty of the factor to keep a regular system of books, accounts, and vouchers of every kind, as it is upon these alone that reliance can be placed for the security of the trustees, of himself, and of the trust-estate. It is of the utmost importance that the factor should attend to the adjustment of all

Procedure on
assuming
office.

¹ See Bridges, 22d November, 1831, 10 S. 43.

Administration of funds. accounts and transactions at stated periods, where such are fixed by the trust-deed or deed of factory; and where such periods are not so fixed, that he should have an adjustment made with the trustees, in order that he may secure the vouching of his accountings in a regular manner, so as to get credit for such acts and intromissions as may appear sufficiently explicit if regularly adjusted, but which, if left to depend for explanation upon concurring circumstances connected with the general management of the trust-affairs, may be difficult and unsatisfactory of explanation, and the cause of much confusion. Such settlements must not only be made, but satisfactorily so, as the law allows them to be rectified within a reasonable time, on the ground, not only of fraud, but of mistake.¹ It is necessary that the factor should prepare such state, whether he shall be able to obtain a meeting of the trustees at the precise period or not, in order that he may get credit for his payments and for his advances, as of the date of the lodging of such state. This may be very important as regards the adjustment of the interest allowed upon the factor's intromissions. At these stated periods the factor ought to consign into the hands of the cashier, in name of the trust, all surplus funds, to be invested for behoof of the estate. Such cashier is usually either a party specially appointed such, where the trust is of sufficient importance to justify it, or a certain bank specified.

Periods of accounting. With regard to the periods of accounting, and amount of interest to be paid, the period of account-

¹ See Mackenzie, 14th June, 1831, 9 S. 730.

ing, the amount and length of time that funds or a balance shall be allowed to remain in the hands of the trustee, is usually fixed by the trust-deed or deed of factory; but in no case will the law justify the periods of accounting being allowed to exceed one year. It is observed by the Lord Chancellor (Cottenham) in the case of *Home v. Pringle*,¹ "The trust-deed directs that the trustees should settle accounts annually with their factors, and upon payment of what should be found due, exonerate and discharge them from their intromissions and management, and within six months of each clearance with the factor, make up their own accounts, and get them approved by an accountant. This seems to assume that the amount so to be settled with the factor was to include the whole of his receipts and payments up to the time of the settlement; but that is not possible. It is the usual course that such accounts should be made up to a certain time, and there must necessarily be a running account not included in any such statement. No doubt this affords the means to a factor of keeping a balance in hand, which does not appear upon the face of his accounts. He may delay receiving a sum of money until after the time to which the account is made up, in order to keep down the apparent balance. But however dishonest such contrivances may be in the factor, they cannot impose any responsibility upon the trustees by whom he is employed, unless they are parties to, or cognizant of, them; and it is obvious, that in the management of a considerable property, it is indispensably necessary to leave a

¹ 22d June, 1841, 2 Robin. Ap. 384.

certain balance in the hands of the manager to meet the current expenses."

Manner of accounting.

The mode in which the factor or cashier is bound to account, where directed to lay out the money at best interest, is thus stated in the case of *Montgomery v. Wauchope*:¹—1st, That for all the money received by him during the currency of each year, he ought to be charged with interest at 3 per cent, *de die in diem*, to the end of the year, and that the account ought to be closed, and a balance struck. 2d, That within three months after closing each year's account, it is proper that he should be considered as bound to have lent out, on securities bearing 5 per cent interest, such part of the actual balances on hand as may be consistent with the probable exigencies of the estate, it being understood, that, till the money is so held as lent out, he is to be liable for interest at the rate of 3 per cent *de die in diem*. The factor is thus bound strictly to account in these terms, over and above the rules of accounting applicable to trustees; so, therefore, he is bound to make investments in the same manner as trustees, that is, in name of the trust-estate, with proper attention to the security of the investment, &c.; so that, although the trustee may only be bound to invest in a certain specified manner, and to a certain amount, if the factor shall transgress the rules of law, as by investing money in his own name, he will be answerable for the full amount of interest that might be so derived from it; as he cannot, any more than a trustee, derive any personal advantage in the administration of the trust-funds,² over and above his

¹ 4th June, 1822, F.

² Campbell, 9th July, 1840, 2 D. 1367.

factor fee or stipulated allowances. But where a factor for trustees retained, with their knowledge, considerable balances for several years, while litigation was going on about numerous questions relative to the estate, and no wrong was intended or done, the beneficiary was found entitled to no higher rate of interest than 4 per cent, as payable by the factor, that being the ordinary rate at which money was usually lent at the time.¹ These rules must necessarily vary according to the rate of interest obtainable at the time.

The question as to what may be considered a fair balance to be allowed to remain in the hands of a factor, must depend upon the special nature and extent of the powers conferred upon him. This may depend upon the nature and extent, certainty or uncertainty, of the incidental claims upon the estate, and period of accounting. Thus, there may be compensation for outlay due to an outgoing tenant, of an uncertain amount, uncertain outlay required in conducting operations, on which the income from the estate may wholly or in part depend, &c. But the proper footing upon which such funds in the hands of a factor ought to be placed, so as to be satisfactory to all parties, is for the factor to be directed to place all funds, as soon as realized, in the hands of the cashier or banker, he retaining the deposit receipts, and with power to draw upon the cashier for such sums as may be immediately required for the purposes of the trust-factory, so that a correct series of vouchers may thus be preserved, and a regular accounting at all times attainable.

In all his actings, the rule is, that a factor can

¹ Fortune's Trustees, 16th Nov. 1839, 2 D. 59.

*Limited
discretion to
trustees*

assume to himself no such latitude as may be taken by a trustee. A trustee is bound to follow the directions of the deed, where explicit, although allowed considerable latitude and discretion as to the manner of doing so. The latitude allowed to a factor, however, is much more limited ; the rule as to him is the converse of that as to trustees ; he has no presumed powers ; his only powers arise from the greater or less latitude conferred by the terms of the deed of factory. It therefore requires a special authority to enable him to exert any discretionary power, such as granting of reductions, eases, or dispensing with securities of any kind whatever. In making payments, for instance, the factor ought to be very guarded as to whom he does so : if it be his duty to make such payments, it is also his duty to see that they be properly and regularly made, whatever be the general terms of his appointment.¹ For his own security, he ought to beware of incurring liabilities or making advances without the sanction of the whole trustees, or a majority of them, more especially where these exceed the ordinary income of the estate ; for no party cognizant of the terms of a trust can otherwise be held to have made advances beyond that extent on the faith of the trust-estate. Accordingly, where a testator conveyed his estate to trustees, with directions, in a certain event which occurred, to apply the annual produce thereof to the aliment of his sister, and the aliment and education of her children, the *jus mariti* of her husband, and all right in him or his creditors to interfere with the proceeds, being excluded, and of the two surviving and accepting trustees one resided constantly in

¹ See Mirlees, *et al.* 466, 467.

England, the other trustee being the husband of the lady beneficially interested in the trust,—in an action at the instance of a party who had been agent in the trust, alleging that he had made advances on the orders of the trustee in Scotland, and of the lady, for behoof of herself and family, it was held, that the trustee in Scotland, acting by himself, could not affect the trust-estate for such advances, but that, in so far as advances were made to the extent of the annual proceeds, and applied according to the directions of the trust, or for the purpose of making up titles, and in the necessary management of the trust, such advances were just debts against the trustees and the trust-estate.¹

The office of factor being constituted for the purpose of management merely, he cannot, without special authority, let, grant leases, or otherwise even temporarily dispose of the property; for such are administrative powers competent only to a party having proprietary powers. In such cases, as in regard to granting leases, it is the duty of the factor, as in other private factories, to ascertain the proper amount of rent to be required, the competency of proposed tenants, &c.; or, in the case of extraordinary outlay being necessary in building or repairing farm-steadings, mills, &c. to report to his principal, the trustee, who is the proper party finally to determine, grant the necessary deeds, and authorize the necessary outlay; the execution of all which it is the duty of the factor to superintend.² The details of this subject fall, however, more properly under the

Granting leases.

¹ Heriot's Trustees, 8th March, 1836, 14 S. 670.

² See Mirlees, *ut infra.* 466, 467.

head of factory generally, as having nothing exclusively applicable to private trusts.

Liabilities of factors.

The obligations and liabilities, on the part of the factor, arise from the acceptance of the deed of factory, whereby he becomes bound to perform the duties imposed by it, and is liable for the consequences attending acts of malversation or neglect in regard to them. The terms of the deed of factory, which is therefore the measure of his powers and duties, is also the measure of his liabilities. A trustee does not, by accepting the office of trustee or cashier to the trust, incur any liability in regard to the management of the trust, beyond that to which he was already subject *qua* trustee;¹ but, of course, he necessarily incurs the additional liability of factor or cashier, and is liable to account for his intromissions as such;² the only special effect being, that it may be a material element in judging of his liability as a trustee, and that no salary can be attached to these offices. In regard to the liability *qua* factor of a trustee appointed by a regular deed of factory, and of one merely acting as such—in the former case, the trustee's acceptance of the office of factor renders him liable, as such, over and above his liability as trustee, as the two offices are distinct, and do not merge in each other in any way; and in the latter case, the distinction between his ordinary actings as trustee, and his actings as general manager *qua* factor, appears from the special nature of these offices. The acts of trustees are the acts of the majority, and are only binding as such; and where

Trustee and factor.

¹ Home, *ut sup.* page 447.

² Montgomery, *ut sup.* page 460.

one of their number assumes the general management, each individual act done by him, on becoming known to the trustees generally, or a majority of them, and acknowledged or allowed to pass in termly accountings, is virtually homologated by them, and becomes an act of factory done under their sanction, on the principle *ratihabito pro mandato habetur*, they being entitled to appoint factors or managers under them, where necessary.

No specific rules of liability by factors of particular kinds can be laid down; these must vary with the conditions of each individual case. But it may be observed, that where there is a mere factory, in which special directions are to be given by the trustees, the mere execution being left to the factor, he can be answerable for nothing more than actual neglect or improper performance, and not for the consequences of advice given *bona fide* to the trustees, as they are in no way bound to act upon such advice. Where the management generally is intrusted to him, without having to consult the trustees—that is to say, where he is rather a commissioner than a common factor—the liabilities are of a much more extensive nature; and any one who undertakes such an office must run the risk of it; for a party may so bind himself to the trustees, although his doing so will not relieve them from responsibility to their constituent, or to beneficiaries generally. Where a party is appointed in consequence of the additional qualification of his being a law agent, his character in these two capacities will remain distinct. It may, in certain cases, be an advantage to have such a party as factor, but he will not thereby be more or less liable as a factor or law agent, even although he be a trustee.

Thus, where a trustee, who was a law agent, had in preparing an heritable security, omitted to search the records, whereby the security was eventually ineffectual, he was held liable in reparation, notwithstanding that the loan was effected among relations and co-trustees, and with every reason to suppose and confide that the lands of the borrower were not encumbered; but as the search, if made, would have prevented the loan from being effected, he was held only bound to replace the principal sum, with bank interest from the date when the loan was made, and, on making payment, to be entitled to an assignation to the heritable security, a claim of damage at his instance being also reserved against the party who had concealed the burdens, and represented the lands as a good security.¹ Nor, accordingly, will he, when acting in one capacity, be entitled to the privileges of the other. Thus, he will not be entitled to a law agent's hypothec over title-deeds or other documents, for his security as to acts done in his capacity of factor. And, of course, in all these cases, a factor will not be liable for the consequences of acts done in ignorance of circumstances which could not necessarily come to his knowledge, in the course of the execution of his duties as factor, and of which he ought, therefore, to have been timely informed. Thus, a writer being factor for a number of trustees under a deed of settlement, and having erroneously paid a share of the trust-funds to the nearest of kin of a legatee decerned, without requiring a confirmation, instead of to a party in whose favour the legatee had left a testamentary bequest, it was

¹ Graham, 4th March, 1831, 9 S. 543.

held, that, as to all payments made after he was aware of the existence of the testament, he was liable to relieve a trustee who had been subjected in second payment, as having himself been in knowledge of the testament, but that, as to prior payments, he was not liable.¹

A factor ought to retain in his possession the bank deposit receipts for the proceeds of the trust-estate of the current term, for two purposes,—first, for paying the various accounts from time to time out of these; and, second, for securing the discharge of his claims against the estate at each succeeding term of accounting. For, being employed as factor or agent for the necessary management of the trust, he has a preference over the funds so managed and intromitted with by him, in competition with all ordinary creditors of the trust-estate, as being entitled to recover both against the trust-funds and against the trustees personally, as his employers. By retaining the deposit receipts, he farther secures himself against the effect of the diligence of an arresting creditor, as to charges for trust-management generally, incurred subsequently to the date of the arrestment. For where a factor or agent deposits a part of the funds of the estate in a bank, and retains the voucher, he has still a lien over the funds for the necessary disbursements. The constituents, that is, the trustees, have only a qualified, not an absolute, property in the fund, their right not being completed by delivery of the voucher, and as the funds so deposited cannot be levied and discharged without the bill, the possession of the writ secures the agent's preference.²

¹ *Mirrlees*, 17th May, 1826, 4 S. 591.

² See *Wight's Trustees*, 12th Dec. 1840, 3 D. See *sup.* page 445.



APPENDIX.



APPENDIX.

CHRISTOPHER SETON, *Pursuer*; WILLIAM DAWSON and OTHERS,
Defenders. 18th December, 1841. 2d Division. Lord
Jeffrey, Ordinary.

THE late Major Seton, father of the pursuer, Christopher Seton, by his trust-disposition and settlement, executed in March, 1819, conveyed his whole heritable and moveable property in favour of trustees, who were directed, after payment of certain legacies, to apply a sum annually for the support and education of the trustee's son, Christopher Seton; and, on his arrival at the age of twenty-one, the trustees were directed to devide in his favour, and, failing him, of a certain series of heirs, and to execute an entail, &c. The trust-deed farther contained the following clause:— “And now, the better to expedite this trust, I hereby authorize and empower the trustees herein-before appointed, and such others as I may add to that list, and the survivors or survivor of those accepting, to add and assume such other person or persons, one or more, as they may think fit, to be trustees, either along with themselves or in their place, and with the same powers as if they had been originally named and appointed by myself; and I declare that the trustees, whether originally added or assumed, shall not be liable for omissions, neglect of diligence, of any kind, nor *singuli in solidum*, but each only for his own actual intromissions; neither shall they be liable for any factors or attorneys to be appointed by them, farther than that they be reputed responsible at the time of entering upon their office.”

On Major Seton's death, in May, 1819, two of the trustees

named, Mr Robert Taylor and the late Mr James Kyd, writer in Cupar, who had been Seton's agent, accepted the trust, and intromitted with and disposed of the deceased's personal effects.

On 6th September, 1819, they assumed, under the powers of the trust, the defender, Mr William Dawson, and two others, as additional trustees, the minute of appointment "declaring, in terms of the trust-settlement, that the new trustees, as well as the original trustees, should not be liable for omissions, neglect of diligence of any kind, nor *singuli in solidum*, but each only for his own actual intromissions." A meeting of the trustees was held the same day, when various directions were given by the trustees for the management of the trust-affairs, particularly as to the sale of a house in the village of Falkland, and of two superiorities. No express nomination was made of a factor, but the meeting "directed Mr Kyd" to dispose of the properties in question.

In December, 1819, Kyd sold the superiorities above mentioned, and received the prices, being £.284 and £.241 respectively, dispositions being executed in favour of the purchasers, acknowledging receipt of the price, and which were subscribed by the five trustees. In 1822, a debt of £.956, due to the trust-estate by Mrs Buchanan Lindsay, was paid to Kyd, and a discharge was granted to Mrs Lindsay, signed by the five trustees. Subsequent to the meeting of 6th September, Kyd took the whole actual management of the trust, and intromitted with the funds. No meeting of trustees was again held till 6th February, 1828, being an interval of more than eight years. Kyd had become bankrupt in December, 1827, when a balance was due by him to the trust-estate of £.1368. The minute of the meeting bore, that this balance was exhibited to the trustees as due by Kyd, "which the meeting regret, and are dissatisfied to find so great, conceiving that Mr Kyd should have apprised the other trustees occasionally of the state of the trust-funds, and, at any rate, ought to have applied any surplus in payment of Major Seton's debts." The trust was thereafter carried on by the trustees, one or other of them taking the actual management.

The trustee's son, Christopher Seton, having arrived at the age of twenty-one, and application being made to the trustees to denude in his favour, they expressed their readiness to do so, on

being relieved of certain debts affecting the trust-property. It appeared that the balance which had been due by Kyd to the trust-estate was almost irrecoverable, and the question came to be, whether the other trustees were to be liable therefor?

In these circumstances, Christopher Seton raised action against the trustees, calling also the trustee on Kyd's sequestrated estate, to have them ordained to execute an entail of certain heritable trust-property (the lands of Balmblae) in favour of the pursuer, and the other heirs specified in the deed of settlement, and to hold count and reckoning for the whole intromissions had by the trustees with the trust-estate, and to pay to the pursuer the balance.

The Lord Ordinary pronounced the following interlocutor:—
“Decerns against the defenders, James Kyd and his trustee, for whom no appearance has been made, in terms of the conclusions of the libel; and, with regard to the other defenders, finds that the whole of the said defenders, except Henry Blair, are personally bound to account to the pursuer for the sum of L.956, 6s. 10d., which they admit to have received from Mrs Buchanan Lindsay, in August, 1822, on account of the trust-estate, by a regular receipt and discharge, running in their names, and subscribed by each of them individually: Finds, in like manner, that the said defenders (with the exception of Henry Blair, as above) are personally bound to account to the pursuer for the farther sums of L.284 and L.241, being the prices of two freehold qualifications, after deducting expenses, belonging to the trust-estate, which were sold and conveyed to the purchasers by dispositions, acknowledging receipt of the said prices, and subscribed by all the said defenders, as trustees and consenters thereto; except that the defender Taylor is stated, in the narrative of the latter of these dispositions, to have actually received payment of the price jointly with James Kyd, for behoof of the trust, and subscribes that disposition accordingly, as a principal donee, along with the said Kyd—and to this extent repels the defences of these defenders, and decerns; but, before farther answer, appoints the cause to be enrolled, in order that it may be explained what farther decree or procedure in the accounting may be necessary to give effect to those findings, and to exhaust the merits of the cause.”

His Lordship at the same time issued the following note :—Cases of this kind, when there is no allegation of fraud or sinister object, are always painful, and often perplexing, from the difficulty of determining to what extent effect can safely or properly be given to such protecting clauses as occur in the trust-deed now under consideration—a difficulty which the Lord Ordinary feels to have been rather increased than diminished by the course of the recent decisions.

“ The nearest approach to a consistent or practical principle that he has been able to deduce (and that not with a perfect assurance that the deduction is warranted) from those decisions appearing to him to be this — that where there has been no actual intromissions, or direct interference with the state of the trust-funds, by any individual trustees, they will not be liable for losses arising from the neglect or dishonesty of others of their number, or of factors or agents appointed by the whole, unless their omission to check or prevent such misconduct amounted, in the circumstances, to such *crassa negligentia* or *culpa lata*, as, both in law and common sense, is equiparate to fraud ; but that, where there *has been* such actual intromission or interference, they will be liable for a smaller measure of neglect or omission, being in such a case to be dealt with as having voluntarily *charged* themselves with the particular funds with which they had thus intermeddled, and being consequently bound to *discharge* themselves, by shewing that they had made such a reasonable disposition or application of them, as again to exempt them from responsibility for the parties by whose faithlessness or rashness they may have been afterwards lost.

“ The Lord Ordinary cannot say that he is satisfied with the soundness of the distinction which a rule or a principle like this would seem to establish, between the degree of negligence which should make a trustee liable where there has been what is called actual intromission, and where there has been nothing thought to come under such a description. To him it has always appeared, that more importance has been ascribed to such actual intromission, than, upon any sound view, it was entitled to — that the degree of actual negligence which should infer responsibility in one case, ought to infer it in every other, and that actual intromission is truly of little consequence, except as affording *clear*

evidence of the personal knowledge in the individuals, of the risks to which the funds under their management must then be exposed. The express provision, which occurs in most trust-deeds, that the trustees shall not be liable for each other, but each only for his own actual intromissions, is intended (it is conceived) merely to exclude the hazard of any claim being made on them, as answerable *singuli in solidum*, and not at all as affecting the measure of their liability for actual or individual neglect, which is usually left to be regulated (as in the present case) by a separate declaration, that they shall not be bound to do diligence, nor be answerable for omissions, or the insolvency of factors, agents, &c. ; and if it be settled (as it is understood to be) that such a provision will not protect against any blameable and extraordinary degree of negligence, it would seem to follow, that it can be of no real importance whether this has occurred after an actual intromission, (which might be in itself quite innocent and laudable,) or under any other circumstances which still left it as a case of equal (though not greater) aggravation.

“ Take the remarkable case of Blane, for example, to illustrate this view of the matter. The trustees were there held, (and justly,) to have actually intromitted with the funds, by individually subscribing certain bank orders, and receipts, and discharges, for the purpose of calling them up from the investments on which they had previously stood. But it was not, in any degree, for this mere *intromission* that they were found liable. If they had immediately seen them invested on new and more beneficial securities, their conduct would have been, not only blameless, but meritorious; nor would this intromission have afforded a pretext for subjecting them for any loss that might have arisen at a distance of time, by the ultimate failure of the new securities, or the dishonesty of the factors who managed them. The sole ground of liability, in short, in that case, was their *extraordinary negligence* in allowing the money so raised to pass at once into the hands of Paterson, one of their own number, without seeing that he reinvested it safely, and without requiring any security from him for its application or safe keeping. But would the case, in this respect, have been at all different, if, instead of themselves co-operating in *drawing* the money, they had merely received a report from Paterson, that it had been paid up to him some time

before, and was then lying in his private cash-account? In such a case, it would not be said that they had themselves had an *actual intromission*; but the fact of the actual state of the money being thus brought as clearly and fully *to their knowledge*, as if they had themselves furnished him with the means of drawing it, could they be less liable for the consequences of their actual neglect, in taking no steps for its safe investment, or requiring any sort of security from the holder, than if the *very same measure of neglect* had occurred after such an actual intromission?

" But though the Lord Ordinary has thought it right to throw out this view of the principle which, he apprehends, should govern such cases, he holds that there was, in this case, quite *as much* actual intromission on the part of the defenders as occurred in that of Blane, or in most of the others, in which trustees not accused of fraud or partiality, and having the same clause of protection in the deed, have been found personally liable. In the settlement with Mrs Buchanan Lindsay, they all, in express terms, 'acknowledge themselves to have received the sum of L.956 there specified, and sign the receipt and discharge accordingly, without any sort of qualification. Their so doing might or might not have been proper or necessary; but, of itself, that act could have inferred no responsibility. If they had seen the money better reinvested, it would have been laudable. If they had even given it to Kyd, with directions to look out for such an investment, and to lodge it in the bank in the interim, they might not have been liable, though he had immediately run away with it, or imposed upon them by the exhibition of false documents, purporting that their directions had been obeyed. If they had even allowed him to keep it in his own hands, upon finding security, they might have been safe. But to give it over to him as they did, without any direction or security whatever, and never once to inquire what he did with it, for the five or six years which intervened before his bankruptcy, when it appeared that it had been traded upon and lost, was an actual neglect, at least as flagrant as that in the case of Blane, and, in the Lord Ordinary's apprehension, would have made them liable, though it had not been preceded, (as it was,) by an actual intromission, very nearly identical in its circumstances, and to the full as strong, as that which occurred in that case.

" The other transactions, as to the sale of the freehold qualifi-

cations, are substantially in the same situation. There, too, the defenders interfered personally in drawing and realizing the money, and affixed their individual subscriptions to dispositions, admitting the payment of the prices; and without which subscriptions, they were aware, those prices would not have been paid. It is obviously of no consequence that most of them signed those instruments as consenters only, in respect that they were not individually infected. It is enough to make the case identical with that of the receipt of Mrs Buchanan Lindsay, and a case of actual intromission — first, that they so signed, in order that the money might become part of the trust-funds, over which, as a quorum of trustees, they had full and exclusive powers, and for the safety of which, when thus drawn in by their proper act, they were bound, in some reasonable way, to provide; and, second, that they were necessarily as completely certiorated, both of the fact of the money being thus realized and given over to Kyd, and of their power to make him take a proper security for it, as if they had not only signed the receipt as principals, but had actually had the money on the table at their meeting, and had themselves handed it over to that person.

“ The Lord Ordinary would have been inclined, on the principles now explained, to have extended their liability to the price of the house in Falkland, and even to the prices of the moveable estate, not realized till after the assumption of the new trustees, in September, 1819; but as they do not appear to have actually put their names to the deeds by which these funds were realized, or otherwise interfered personally in the transactions, he was unwilling to risk going beyond the warrant of the recorded decisions of the Court, by subjecting them, on what he conceives, however, to be conclusive evidence of their knowledge of the insecure state of these funds, and their total and continued neglect of all measures for their security or just application. It is also of less consequence that the liability should be thus extended, as it is understood, that, under the interlocutor as it stands, nearly as much will be recovered as to replace to the pursuer all that has been lost by Kyd’s insolvency. It is a singular, and, it is believed, unprecedented, feature in this case, that, after their first meeting in September, 1818, these trustees *never met*, or were called together again, till after Kyd’s bankruptcy in 1828, though they

acted, in the meantime, so as to put into his hands, without the least precaution, funds which, without their interference, he could never have obtained, and actually went on afterwards to assume a new trustee in his room, and have continued to this day in the management of the pursuer's property. Blair, who was thus assumed after Kyd's catastrophe, can, of course, have no share of the responsibility of those who trusted him."

The defenders having reclaimed, the Court, before further advising, appointed minutes of debate on the whole cause to be put in, and the other judges to be consulted — the question for consideration of the consulted judges being, Whether the interlocutor of the Lord Ordinary should be adhered to or altered?

The following opinions were returned:—

Lord Cockburn — Lords Justice-General (Boyle), Mackenzie, Fullerton, and Cuninghame, concurring — "Without exactly adopting all the observations in the Lord Ordinary's note, we are of opinion that his interlocutor is right, and ought to be adhered to.

" This cause has been delayed until we should have the benefit of the opinion of the House of Lords, in what was stated to be the somewhat analogous question of *Home v. Pringle*; and the judgment of this Court was affirmed there last June.

" In their circumstances, the two cases are quite dissimilar, but the valuable remarks made by the Lord Chancellor confirm us in the conviction, that the general principle of our law is, that neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amount to *culpa lata*. This part of the case of *Home v. Pringle* was decided, on appeal, upon this very ground; for the trustees were assailed there, solely because the facts did not imply negligence of this description. The principal charge against them was, that, though they had appointed a solvent factor, they had failed to subject him to proper periodical accountings. But the House of Lords agreed with this Court in holding this fact not to be established, because there were only delays of a few months; and, on the whole, though he might have been looked after more strictly, there was no culpable failure.

" But here we think that there was. It is not necessary for

us to specify the circumstances in detail. Their substance is, that certain sums belonging to the trust-estate came into the hands of the trustees, or of one of their number, with the knowledge and consent of the rest, as is proved by deeds signed by them, acknowledging the receipts; that though the trustee said to have personally received these monies was allowed to interfere so much, that he has been held out as the trust-factor by the defenders in this action, he had never been regularly appointed to any such office, so as to bring him or them responsibly within the operation of that part of the protecting clause which frees the trustees from being accountable for factors who were reputed safe when appointed; that this person, having thus received the money with the knowledge of his brethren, they totally failed to take any subsequent charge of it—insomuch, that, though they continued to act in other respects as trustees, they made no inquiry as to what had become of the monies, or even held a single meeting from 1819, when the sums were received, till 1828, by which time the trustee they had chosen to rely upon was bankrupt.

“ We hold this total disregard of the trust, after their attention had been called, by their being required to sign the deeds, to the fact that these sums had been received, to amount to *culpa lata*. Though aware of the indulgence due, under such a clause, to trustees, we think that no trust-property would be safe, if such gross negligence were not to make those who are guilty of it liable to the party injured.”

Lord Ivory—Lords Gillies and Murray concurring—“ I concur generally in the above opinion; but I would not, perhaps, lay so much weight on the circumstance of Kyd’s not having been regularly appointed to the office of trust-factor.

“ In point of fact, the discharge granted by the trustees to Mrs Lindsay in May, 1822, bears payment to have been made to ‘the said James Kyd, as factor for the said Christopher Seton’s estate, and for behoof thereof;’ and the previous disposition to Mrs Buchanan in 1820, in like manner, proceeds on the narrative, that payment had been made (of course by authority of the subscribing trustees) to ‘the said James Kyd for behoof of the trust-estate.’ It is difficult to hold this (*quoad* these payments at least) as other than equivalent to a formal warrant to recover the money in the

character of factor. And, indeed, even as to those others of the deeds which contain no words of similar import, it rather appears to me that the authority to uplift the money, implied in the very subscription of the trustees, must receive substantially the same effect.

"After all allowance, however, has been made on this ground, I can still see no reason for coming to any other conclusion than has been done, as to the legal responsibilities incurred by the utter neglect of their own proper duty on the part of the trustees. The trustees were left in charge of the estate of a pupil; and that pupil, as the trustees knew, had no natural protectors to look after his interests, being an illegitimate child. In such a situation, the trustees were inexcusable for their total and reckless neglect of the estate which they had undertaken to administer. And even, therefore, had they, by the most formal deed, nominated Kyd (one of their own number) as factor, I should still have been of opinion, that their not holding a single meeting as trustees for nine years after their acceptance, and their placing the whole funds of the estate into Kyd's hands, (for their concurrence in the deeds, which alone enabled him to get the money, amounts to no less,) without ever, from that moment, taking a single step to compel him to account, or at all to ascertain what he was doing with the estate, was enough to bring the case up to that full measure of *crassa negligentia*, which undoes all legal or equitable claim on their part to protection, even under such a clause in their favour as is here founded on. Clauses of this kind do not protect against positive breach of duty. And where one accepts of the office of trustee, and thereby undertakes, as he surely does undertake to some extent, to administer or superintend the administration of the estate which the trust places under his charge, what is it short of a breach of duty when he stands wholly aloof, and does absolutely nothing, leaving the estate in the meanwhile to run to ruin, not less effectually than if he had never taken upon him the office of trustee at all?

"I may just farther explain, that I do not regard the circumstances of the case as sufficient to bring the trustees within the category of parties liable for actual intromissions. Their subscription of the deeds I regard merely as a subscription for conformity. Accordingly, had Kyd failed with the funds in his

hands within any reasonable period after their having thus authorized and sanctioned his receipt of the money—there being no room in this case for any charge of gross negligence on their part—I think they must have been free. I should have been of the same opinion, even had the money actually passed through their own hands—they being perfectly entitled to call in the assistance of Kyd, or any other third party, as factor or agent, in order to the practical appropriation and disbursement of the money in terms of the trust. But in no view can I hold them excusable, after putting the money into the hands of such third party, for having allowed it, or the greater part of it, to remain there for the space of nine years wholly uncared for, and without so much as an account having, during all that time, been rendered. It is here that the gravamen of the case, as regards the trustees, in my opinion lies. For, could I get over the plea of *culpa lata*, as applied to this *species facti*, I should have been disposed, in other respects, to allow them the protection of the clause which the trust-deed contains in their favour; that protection being only to be withheld when there is a clear case of *culpa lata*, which, however, I think there unquestionably is here."

Lord Justice-Clerk.—In this case, I think it is incumbent on me to state fully the grounds on which I understand that the opinion of the majority of the Court rests. That opinion merely states the result of the deliberations of the Court; while in the more detailed opinion subscribed by Lord Ivory, Lord Gillies, and Lord Murray, and in the note of the Lord Ordinary, views are taken of the case in which I cannot concur, and on which I am not prepared to say that judgment ought to be given in favour of the pursuer. The frequent occurrence of these distressing cases, and my knowledge that in practice very many questions respecting the liability of trustees are compromised, from the difficulty of collecting from the previous decisions distinct principles of judgment, make me feel it to be right and necessary to state at length the grounds on which, generally speaking, I understand the opinion of the majority to rest; and, at all events, the views which have led me to the conclusion that the trustees are liable, personally, to make good and forthcoming the sums to which the interlocutor refers.

This is an action to compel trustees to denude and to account, brought by the first beneficiary in a trust-deed, executed in 1819, by Major Seton, the father of the pursuer, and which took effect by his death in May, 1819. The summons sets forth, that two of the original trustees—Kyd, a writer in Cupar, and Taylor, who was his clerk—accepted; and that, in the September of that year, they assumed and appointed other trustees to act along with them, who accepted, viz. George Seton, William Dawson, and Andrew Thomson, W.S. The pursuer was an infant, at the time of his father's death, of two years old, a natural son. The trustees were appointed his tutors and curators, and were in truth his only guardians and protectors. The trust-deed left only one legacy—a small annuity to the mother—and directed the property to be held and managed till the pursuer came of age, and to be accumulated for his behoof. A long period of management was provided for on the face of the deed. The discretionary power given to the trustees to pass over the pursuer in the event of misconduct, and to denude by executing the prescribed deed of entail in favour of another party in that event, rendered the trust extremely onerous and important.

The pursuer, by the form of his action, cannot certainly alter the principles of liability; but the general action of count and reckoning is well calculated to bring out the true nature of the questions, which are,—1st, Are the trustees chargeable, in taking an account, with the sums stated in the record? and 2dly, Do they adequately discharge themselves in the count and reckoning? The facts are very short. The record of this trust for the first ten years—the important period—consists of the minute of one meeting, 6th September, 1819, when the new trustees were assumed, whose powers were commensurate under the deed with those of the original trustees. This meeting authorized and directed steps to be taken for the sale of certain properties, and authorized Mr Kyd to advertise the sale. The minute does no more. It gives no other powers—it devolves nothing more on him. No other meeting ever took place until July, 1828. Mr Kyd was allowed to have unrestrained management of the trust-estate. But he was not appointed factor, though he may have practically acted as such; and he had no commission or mandate empowering him to act for the other

trustees. I wish, in passing, to be understood to say, that I never shall be prepared to sanction the legality of a payment of a salary or profit to one of the trustees to be factor. But Kyd was not appointed factor. This fact is extremely important; because, when a regular factor is appointed, there is forced upon the trustees the consideration of the propriety or necessity of caution, and of annual or periodical settlements of accounts. But when a trustee, being the man of business of the family, assumes, without any thing being done, the agency and management, false delicacy generally prevents either the one or the other being attended to. But to entitle trustees to found upon and claim the benefit of a clause exempting them from liability for factors "to be appointed by them, farther than that they be reported responsible at the time of entering upon office," (very special words these, which relate to a regular appointment,) two things are necessary to bring them within the predicament to which the clause applies,—
1. That a factor be regularly appointed in terms of the clause;
2. That the transaction shall be brought within the regular dealings between principal and factor, by instructions given to the latter, but not timeously complied with, or from the trust being unexpectedly abused in the execution of duties properly devolved on a factor regularly appointed. The only minute of the trustees declared the majority of the old and new to be a quorum. Mr Kyd proceeded to take steps for selling two properties, and to compromise a claim for which a large sum was to be paid. The properties were sold in December, 1819. The deeds were subscribed by the trustees on the same day. The sum paid by Mrs Lindsay, or Buchanan, amounted to L.956, 6s. 10d. and the discharge for it is in May, 1822. In all these cases, the receipt and discharge of the trustees was the foundation of payment. There is no proof whatever as to the two properties, that the money was paid, except upon delivery of the deed; and, at all events, if the fact were otherwise, this could only have been private arrangement and matter of confidence between Kyd and the agent for the purchasers, for he had no authority to receive money, or discharge those paying it. As to the L.956, it appears clearly that though Mackenzie and Innes sent Kyd the money after the deed was discharged, and before delivery, this was a private arrangement with them, as they took an obligation from

Kyd to bring the deed immediately over to Edinburgh. Allusion is made to the fact that this deed called him factor. This might, in a question with those relying on that deed, if any thing had been done on the faith of it, have been important. But in a question between the pursuer and the trustee, it is of no moment, and will never come in place of an appointment as factor, or give them the benefit of a regular relation, duly constituted by the devolution of duties on a factor, when, in point of fact, such appointment never did take place. In all the three cases, monies were paid solely upon the receipt and discharge of the trustees. Without such receipt and discharge the money could not have been paid, at least with any safety to the parties, for no one held power to receive and discharge.

The first point, then, is, Are these trustees chargeable with the sums in question? I shall afterwards advert to the doctrine of the Lord Ordinary in his note, that actual intromission is of no importance. Taking a very different view of that matter in principle, I wish first to ascertain the fact whether the trustees were chargeable with these sums. I apprehend, that when money is paid to a body of trustees, or any other set of individuals acting under a joint appointment, whose concurring receipt and acknowledgment is necessary to warrant payment, and to discharge the payer of money, the payment is made equally to all, not only in the estimation of law, but in fact; so far as more than one can participate in the act of receipt of money. In most instances, the money may actually be put into the hands only of one—or only one be present—or only one draw out the money upon an order signed by all—or, what often happens by the private arrangements between men of business, the money is paid on the condition of the receipts of all being obtained and produced. These appear to me matters utterly immaterial. Then money is paid only on the security and delivery of the joint receipt of the trustees, without which it would not have been paid; without the delivery of which, also, it would not have been held in law to be paid. And why? Because, as no one could discharge, so no one was authorized to receive payment; and hence, as the discharge was a joint act, so also is the receipt. One may have and hold the receipt, but the payment to him is payment to all, and therefore the payer is safe. That the deeds mention payment to Mr Kyd,

and that in one he is styled factor, is not of the slightest importance. The payment was made, not on the faith of any authority that he possessed, but on the joint receipt of the trustees. In the question with the beneficiary, the particular terms of these deeds are only of importance so far, that in addition to the joint receipt of all, they prove individual knowledge that all the sums not only had been paid to them, but, being so paid, were, further, in the hands of one of the trustees, where they ought not to remain, and were under their own direct control, waiting for their disposal. The Lord Ordinary properly disregards the specialty, that into Kyd's hands the money may have been put; and in conformity with the clear and distinct opinions in the case *Blane v. Paterson*, holds that the money paid on their joint receipt or discharge, was personal intromissions by the trustees signing it. Upon this part of the case I wish to avoid reference to English law, some of the distinctions of which, on this point, I do not fully understand, and are inapplicable to our law. According to the principles of our law, I am not aware how any number of persons can have any joint intromission, except by money being paid on their joint receipt. If it is said that joint intromission is not within the notion of actual intromission, and that when the money is paid to trustees, upon a joint receipt and discharge signed by all, it can yet be held to be paid only to the individual whose hand actually receives the money, I think that view is unwarranted by decisions or principle, is inconsistent with the rules applicable to all similar transactions in all other cases, and is against common sense, and the ordinary understanding in all business transactions. What is the fact that is mainly looked to in regard to actual intromission? Is it not that the money could not be paid except to those who receive it? Is it not, as Lord Redesdale says, that when so paid, it is wholly under their power, control, charge, and disposal? and is not this the case as much when there are three, as when there is but one, receiving the money? The Lord Ordinary has stated in his note, (contrary to the view explained by him in the case of *Grieve v. Amos*,) "that more importance has been ascribed to actual intromission, than, upon any sound view, it was entitled to;" and adds, that "actual intromission is truly of little consequence." I beg distinctly to dissent from that proposition,— 1st, Because our decisions, as the Lord

Ordinary himself distinctly states, rest upon the very principle which he thus doubts; and I think it is too late and unsafe, especially in this class of cases, to throw doubt upon points admitted to be fully settled. In the second place, I think the importance attached by the Court in prior cases to actual intromission, is proved to be a sound view by the remark of the Lord Ordinary in the very same sentence, viz.:—"That actual intromission affords clear evidence of the personal knowledge of the individuals, of the risk to which the funds under their management must then be exposed." But, thirdly, I cannot assent to the notion, that the degree of negligence which ought to infer responsibility, should equally infer it whether there has been actual intromission or not. I cannot understand the degree of responsibility being the same in two cases so widely different; and therefore I think the legal consequences of neglect, even total neglect, must be very different. Neglect of duty as to money which you have actually received, and as to money which you have not received, and may only casually, if at all, know that another, subject to your orders, has received, or which, by inquiry, you might have known that he had received, appears to me to be negligence of a wholly different character, both in a legal and a moral point of view. In the one case it is simple neglect. In the other it is plain and positive breach of duty, amounting to *dolo*. But above all, this remark seems to lose sight of the main fact in every such case. When actual intromission is proved, the necessary result is, in law and in fact, that the individual has the money; that is the first consequence and the first result. Money is paid to A B, or it is paid to the persons on a joint receipt. Well, then, what did they do with it? They must either have it, and so be liable for it, or they did something with it. When they say they have it not, in answer to the receipt which proves it was paid them, are they not, then, (holding, as the Lord Ordinary does, that there is actual intromission in such a case,) to discharge themselves? Well, then, did they put it into a bank in their joint names? What did they do with it? Wherever there is actual intromission, they must shew what they did with it, and why they are to be discharged of it. I hold actual intromission to be of the very essence of liability. Whether there has been upon the facts of this particular case actual intromission, is one point; but if

there is actual intromission, then that at once makes a legal charge, upon which the account must be stated, and of which the party must free himself. Now, then, what is it the parties so charged with moneys, can here maintain? One view is hinted at, upon which no distinct plea is raised, and no argument directly maintained, which I shall notice in the first instance. The defenders are at great pains to quote prominently the clause, declaring the trustees not to be liable for any factors to be appointed by them, and although there is no distinct plea founded upon this clause, which in truth the facts of the case would not warrant, yet under the fifth plea in the defences, and the second in the record, there is an attempt to take the benefit of it. Now, when the trustees desire to found upon such a clause as this, they must shew, 1st, That they acted upon the clause; and 2dly, That in the particular transaction they have brought themselves within it. Here the case seems clearly to fail the defenders. They did not, as I stated, appoint Mr Kyd to be their factor. There is no minute of appointment — no deed of factory. The trust-deed refers plainly to a very special and formal appointment. I have already said that an overly and tacit allowance of one trustee to assume the whole management of a trust, and authorizing him to do particular acts, is, in my opinion, a very different thing from the direct appointment of a factor, as contemplated by the deed. When such appointment is made, it forces upon the notice of the trustees *their* duties as well as *his* — the rendering and settling of his accounts — the extent of his powers — the intromissions under the factory, and the checks which that may render necessary. Further, to the extent of the factory, and of the duty devolved upon the factor, they are exercising a regular power under the trust-deed; and while they are warranted in that devolution, they must do so formally and regularly, by exercising the power by an appointment, which is the measure and the warrant of the factor's authority. But, in the second place, the particular transaction must be brought distinctly within the factorial management, in the relative position of employers and factors. There being no factory here, Mr Kyd had no authority to receive the money, or grant a receipt. It did not come into his hands under any such warrant. The original and only minute does not say a word as to the receipt of money by Kyd, and he could have produced no

authority to the purchasers if he had not obtained the joint receipt and discharge of the trustees. Then, as the money was received by them, and not by Kyd as factor, how does it assume the character of a factorial transaction? Did the trustees, themselves receiving the money, (as I hold,) direct Mr Kyd, as the factor, to invest it, or stock it out, or mean to pay off debts, or to take care of it? Why, they gave him no instructions and no directions whatever. How comes the matter, then, into the character of a factor's transaction, he not having received it *as such*? Is it meant to say, that simply by leaving it in the hands of one trustee, their general agent, it may be without inquiry, without reflection, and without saying a single word upon the matter, they are entitled to ask the law to hold by fiction that *they did meet*—that *they did make him factor*—that *they did put the money into his charge as factor*, and with the directions to employ it for the benefit of the trust, which, if *they had met at all*, would probably have been given? Of all the views which can be taken of the case, this appears to me the most untenable. In order to bring themselves within the clause, they must shew that *they acted under it*—that *they appointed a factor*—and that *they put this transaction regularly under his factorial charge*, with the requisite instructions; thereby relieving the trust of it by a devolution on the factor, which the trust-deed warranted. But, even if that had been proved, I beg to say, that I would not have taken it off the hands of trustees, that for nine years they never met—never saw the factor's accounts—and were not even misled by statements from him that he had invested or duly employed the money. That view of the case, however, does not in my opinion arise, and I think that it is most material to observe discrimination as to the grounds of judgment.

Then, if the trustees, charged with the money on the ground of actual intromission, are not relieved by reference to any factorial transaction, on what other ground are they to discharge themselves? Having received it, what did they do with it? The only answer truly is, that they did nothing at all for nine years, and allowed one of their number corruptly and dishonestly to embezzle it. They gave no directions in regard to it. They did not see that it was placed in their own names. They gave no such order. They made no inquiry. They did not ask whether that money

which they had received, and of which they had the full control, was retained under their control, or put into the private pocket of the individual trustee whose hand received it. They say they knew it did not go into their pockets. But, having received it, they were only the more bound to inquire after it, since it was not in their private accounts. They neither gave direction nor authority beforehand, for the application of the different sums that might arise from the sales. In the minute of debate, they wish to represent as if they *thought* that debts had been paid. They could not believe that; for, though they had said it would be expedient to pay debts, they gave no directions; and they knew that there was no authority to discharge debts without coming to them. Not very consistently, they say, at the same time, that the principle debt *could not be paid*, owing to the mental incapacity of the creditor. If that was known to them, it would only the more prove that they could not believe themselves to be discharged of the sum. But having never met, or even made an inquiry into this subject, this probably is but a remark thrown out *ad captandum*. Then, what is the ground on which they wish to be discharged of the money, assuming that they must, in the first instance, be charged with it? They cannot mean that they deliberately intended to make a loan of it to Kyd; and the fact that they did nothing, excludes that statement, if relevant. In fact, in the view I am now considering, they have nothing whatever to say, except that they forgot, or, as the letters in 1825 seem to indicate, were afraid to make any inquiry at all. It is in this point of view, with reference to that *culpa lata*, which is sufficient to prevent a party pleading the benefit of a protecting clause, that the fact of actual intromission is of such vital and decisive importance. When parties are once charged with money as actual intromitters, the legal and moral duty of care and attention to the funds is not only the highest which trustees can incur, but they are then in the predicament for which the deed holds them liable. The deed holds them liable, when *actual intromitters*. General law holds them liable. How, then, that fact can be of little consequence, I cannot understand, since of that liability they cannot be discharged. No doubt, they will have great latitude as to the manner in which they are to discharge themselves. You will judge favourably, and leniently, and kindly, of gratuitous

trustees, when, as Lord Glenlee says, they have addressed themselves to the performance of their duty — have taken the steps and given the directions which might be expected — but have unexpectedly failed to do what they proposed, especially if from the fault of others. The office of trustee is most peculiar, and its responsibilities will generally be discharged in the eye of law, if trustees are found honestly to have addressed themselves to the general fulfilment of its duties. But then, in regard to the question of gross negligence or *culpa lata*, the fact of actual intromission is the leading consideration. Utter and total neglect, for nine years, of money which, *qua* trustees, they received — neglect, complete from the hour when it was paid, never asking the one of the other, what was done with it, or even whether it was in their joint names, or giving any direction to put it even into that predicament — is, I conceive, that *culpa lata* which, in its legal consequences, must be tantamount to dole. I know of no negligence or *culpa lata* so great, so plain, so utterly inexcusable. Every other species of negligence is comparatively venial in the eye of law, except that which commences with the actual intromission with, and legal liability for, trust-money had and received. When one embezzles money so received, I think the result, *in point of liability*, is the same as if all had embezzled, though you might not direct accumulation of interest in the accounting. The protecting clause, then, humbly appears to me not to be available to the defenders in the circumstances of the case; first, because they are called to account for actual intromission, and cannot discharge themselves of the sums with which they are personally chargeable; and, secondly, because their own account of the matter exhibits a degree of *culpa lata* which amounts to dole, and which deprives them of the benefit of clauses of protection, only intended, in my opinion, for trustees addressing themselves to, and attempting, more or less diligently, to discharge, the duty and functions of their trust.

I am disposed to make the interlocutor more general, if, after the consultation, we can vary its terms. It specially sets forth and founds on the fact of the moneys being drawn on the joint receipt and discharge of the trustees, but it says no more. Now, while that fact proves that the money must be put to the charge of the trustees, the important question remains, that they have not

discharged themselves, and, therefore, either the interlocutor should be more general, or should say more. I think it is sufficient in the count and reckoning to find them liable for, and to decern for, the three sums mentioned in the interlocutor.

These are the grounds, generally, on which I understand the opinion of the majority of the Court rests, though, of course, I do not mean at all to imply that the particular remarks I have made are to be viewed otherwise than as my own.

Lord Medwyn.—We have opinions given in this case, holding the trustees liable, but by no means on the same grounds. The Lord Ordinary finds the defenders, with the exception of Henry Blair, liable in the three specified sums, because they were received under discharged subscriptions by them, though only as consenters; and he explains his views of the principle of the law as to such cases, from which I do not incline to differ. He adds, however, that he thinks more importance has been attached to actual intromission than should have been. Again, the majority of our brethren found their opinion on the fact of the trustees having received these sums, and then having neglected to take subsequent charge of them; while the other opinion distinctly says, they do not think the facts of the case bring the trustees within the category of parties liable for actual intromissions. Now, these views are different, and somewhat unsatisfactory, to rest the same judgment on. I must say, I concur in this last view, that the ground of actual intromission is not sufficient to impose liability against the trustees. I am quite aware, that, where two or more co-trustees, in the ordinary case, concur in granting an authority to receive money, they make themselves responsible for the application of it. But where there is a plurality of trustees, it is necessary for many to act in authorizing a payment or granting a discharge, while only one can receive the contents; and as many persons might scruple to act under the responsibility of being liable for another, perhaps not of their own selection, the protecting clause has been introduced into such deeds just for such a case, that the trustees shall “not be liable for omissions, neglect of diligence of any kind, nor *singuli in solidum*, but each only for his own actual intromissions.” The testator is entitled to dispose of his property under any conditions he pleases; and if he chooses to relieve the trustees, acting gratuitously, and as his friends, from any portion

of responsibility, his heir is not entitled to object to this, but must receive this qualification of the trustees' responsibility, and adopt it as he does every other part of the trustee's disposition, both what is in his favour, and what he may think is not so. He is equally bound by both. The words here are peculiar and expressive; and I cannot affix any other meaning to them than this, that the intromission is not to be constructive or implied, but actual and real — his own act receiving the money, and not the act of another, for which, but for this clause, he might have been made responsible. To this extent, at least, I think there can be no doubt that, wherever he is called upon by his co-trustee to grant an order for money, or subscribe a discharge, because it requires a quorum for the act, and gives his name with the view of carrying on the business of the trust, which would stand still without this, — when he subscribes, as it is termed, merely in conformity, — if this money is misappropriated by a factor or co-trustee, he cannot be made liable on the ground of intromission alone, as there has been no actual intromission on his part. Now, it seems to me very plain, that all the defenders did here ~~was~~ in conformity merely, and that they had no actual intromission with any of the three sums in question. They were assumed as trustees by Kyd and Taylor, who had been nominated by the trustee. Kyd had previously been the trustee's agent, and, as most natural, he assumed the management — he and Taylor, his clerk or partner, being the only accepting trustees. As the assumed trustees found him in possession, they continued him in it. The first sum claimed against the defenders is the price of the superiority of Balmblair. The disposition bears, that the money was received by Kyd and Taylor, and then they, with the consent of the assumed trustees, dispone and convey. As to the price of the superiority of Kirkforther, the deed bears, that Kyd received the money; and the conveyance then is exactly as in the other case, by Kyd and Taylor, with the consent of the others. To shew that this was the course of management, and the natural course, I may notice also the sale of the house in Falkland. The disposition is granted by Kyd and Taylor, with consent of Mr Thomson. Neither Seton nor Dawson subscribe, and the narrative bears that Kyd alone received the price.

The compromise with Mrs Lindsay bears, that the sum paid was

to Mr Kyd, as factor, and he and Taylor, and the others, as consenters, subscribe the discharge with this express statement ; so that, in this respect, there is an inaccuracy in the note of the Lord Ordinary,— at least, if the statement at page 8 of the minute for the defenders be correct.

Now, then, it is clear there was no actual intromission in any of these acts of trust-management : the money all came into the hands of the factor, for truly Kyd was so, although a formal factory may not have been granted ; but in these deeds, drawn or revised by himself, at least in some of them, he designates himself as factor ; and I must say, that I can see no meaning or use of the protecting clause, if it does not most directly apply to a case such as this. But no doubt it is a different question, whether a trustee may not make himself responsible for a factor or co-trustee, if loss has arisen which he might and ought to have prevented, if he had exercised such a superintendence as his duty and office of trustee called upon him to exercise. The Lord Ordinary argues that there should be no difference as to amount of negligence to make a trustee liable, where there is what is called actual intromission, and where there has been nothing thought to come under such a description. If what is truly actual intromission is meant here, I cannot say I incline to assent to this view of the responsibility of a trustee ; as, where there has been actual intromission, it does, in my view, make the greatest possible difference as to the responsibility of a trustee. He must account for whatever he receives, whether any co-trustee is also to be liable or not. But it is quite true, that, without intromission, as well as where there is intromission, a trustee may be liable, if loss arises through his culpable negligence and gross neglect of plain duty. At the same time, it must be always remembered, that the trustees here are gratuitous trustees, and the *culpa* must be much greater, to make them responsible, than if they were salaried officers of Court. Still, their conduct may be such as to make them liable ; and, on the other hand, though there be negligence, it may not amount to what will impose the responsibility on them. Every case must depend on its own principles. Now, there are two cases which require attention here—the case of Blain, and of Home of Paxton. In the latter, the trustees were not found liable, and in the other they were. The case of the Paxton trust has been

affirmed. I see nothing in the speech of the learned Lord moving the affirmance, importing more than that there may be such neglect of duty as to make trustees liable for a factor. That that case was not held to come up to the point, is all that can be gathered from this decision. That the present case approaches much more nearly to the first mentioned than to the other, is very clear; but still I hesitate to say, that, though the principle of decision be the same in both, the state of the facts out of which negligence is to be inferred, is at all of the same import and amount. The money, in that case, was taken up from the securities in which it had been invested by the trustee, and was left in the hands of one of the trustees, on pretence that he would get better interest. It was not a prudent act, neither was it a necessary one. The money might have remained where it was, till some other eligible security could be found. Here, however, to convert this property, which was producing nothing, into money, was a proper act of trust-management, and the compromise was also beneficial to the estate. The money then, in due course of management, got into Kyd's hands. He was the proper party to receive it: he received it *as* factor, not *as* creditor. He was in good credit, trusted even by one of the trustees in the management of his own affairs, and, although it be said that he lost nothing by Kyd's bankruptcy, it is not said he closed his transactions with him because he distrusted his credit; but it may be supposed it was in the ordinary course of such business. Then every opinion given on the bench held, that the element of actual intromission entered into this case; and this is rested on as the foundation of the responsibility to which the trustees there were subjected. The trustees did more in that case than subscribe in conformity. They unnecessarily authorized Paterson to take the money; and wherever it is held to be the import of the acts of the trustees, that they must be viewed as intromitters, I do think it follows, that their responsibility, on account of not providing for the security of the money so introduced with, must be more stringent than in a case where no such element exists. Now, here the assumed trustees, I think, are protected from the charge of being intromitters, and their responsibility must be found in what they culpably neglected to do. They found Mr Seton's man of business, named one of his trustees, acting as agent, and factor, and trustee. He assumed them into

the trust ; they concurred in authorizing him to do certain beneficial acts for the estate ; and they subscribe deeds and discharges in conformity, bearing that the money was received by Kyd, or Kyd and Taylor. This negatives actual intromission, and they are expressly to be liable only for actual intromission. They live at a distance, are never summoned to attend a meeting of trustees, never surmise that the credit of their factor is doubtful ; and when he becomes bankrupt, are they liable for omission merely, when it is expressly declared that they shall not be liable for omission of diligence of any kind ? By this last expression is meant the diligence which is prestable by a factor or trustee, in the management of the estate, and that is not confined to diligence against a debtor to the estate. When this latter is only intended, the expression is made more definite to the object. Here the meaning is the diligence, in the sense of the civil law. If, then, the trustees are to be made liable, it is a very hard case ; and the truth is, instead of getting benefit from this protecting clause, they have been allowed to be misled by it, perhaps to their ruin. Whatever interpretation may be put upon it by courts or lawyers, surely no plain man could doubt, that, if they did not actually receive any of the money, he would not be liable for it ; and especially that no omission would involve him in any such consequences as this responsibility for Kyd's intromissions.

Lord Moncreiff.—I also consider this a case of very great importance, because it appears to me, that the effect of the judgment about to be pronounced, will be to render the usual protecting clause in such trust-deeds of no effect, and to warn all men that they can place no reliance on it. I cannot concur in the opinions of the consulted Judges. Perhaps I should say, that I differ from them on the essential principle of judgment, if it were not that, from the discrepancy among them, I am somewhat uncertain what that principle is. I also have the misfortune to differ from two of the opinions which I have just heard. I concur in the opinion of Lord Medwyn. The substantial question is, whether these gratuitous trustees are to be made personally liable for the consequences of the unforeseen bankruptcy of Mr Kyd, the confidential friend, factor, agent, and favoured trustee of the trustor, because he failed to apply money received by him alone, and which had been raised in order to be applied in the payment

of the debts of the trustee? A claim of this kind must be vested on some clear, tangible ground in law: for, independently of the special clause in this and other trusts, it is very far from a clear matter, that any personal liability would arise from the simple fact thus occurring. The party who insists on personal liability against persons who have only acted as trustees, must say something more than that the money has been lost under the trust-management. Independently of any special protection, they never undertake any thing more than a trust-administration; and they would clearly not be answerable for losses under it, unless something far beyond the ordinary contingencies of such affairs were alleged. If, having power to do so, they lent money on personal bond to a person fully believed to be of good credit, and the debtor unexpectedly became bankrupt, they would certainly not be personally answerable. If they had put money in a bank reputed good, (*e. g.* the Fife Bank,) and the Bank afterwards failing, the money were lost, beyond all doubt they would not be answerable. It would be a loss to the estate, but *damnum fatale*. I put the point thus, supposing there were no protecting clause in the trust-deed. It is in the nature of a gratuitous trust. The trustees would be liable for no more diligence than they are in their own affairs—*diligentia media*, in the Roman law. But the law of Scotland, in the practical constitution of private trusts, has considered the subject in a different light. The consideration, on the one hand, of the great importance to the comfort of many families, both of the higher and middling orders, of trusts necessarily of some permanency being accepted and conducted by the persons selected by the testator, or named by those authorized by him: and on the other, of the manifest hazard connected with the business of them, necessarily conducted by individuals only, has, most justly and reasonably, in my opinion, gone beyond what would be the natural result of any trust, and interposed a special system of protection to such trustees against the consequences of the voluntary consent to act at the trustee's desire. The special clause of protection must mean something more than if it were not there. Now, before looking at the clause, or the facts in this case, let it be observed, that it is a question between the gratuitous donee of the testator and these trustees acting gratuitously. He cannot repudiate the undertaking of his author. It is really the

same case, as if old Seton himself, being absent for a time, had constituted a similar trust for his own benefit, and were calling these gratuitous trustees to account to himself. They are to answer to him ; but they are to answer under the clear protection of all the clauses of his deed, and with reference to the circumstances in which it was granted. Then look at the clause. From the technical frequency of it, we are apt to read it as mere words of course. But has it not emphatic meaning ? — “ and I declare that the trustees, whether original, added, or assumed, shall not be liable for omissions, neglect of diligence of any kind, nor *singuli in solidum*, but each only for his own and actual intromissions ; neither shall they be liable for any factors or attorneys to be appointed by them, farther than that they be reputed responsible at the time of entering upon their office.” The question, therefore, is not on the ordinary liability of one of several conjoined parties for the acts of another. It is on the responsibility precisely defined by that clause. That is the contract on which alone the defenders agreed to act at all — clearly entitled to the most favourable construction, as long as their honesty and *bona fides* is admitted. I shall consider what extent of negligence or omission will destroy that privilege. But, first of all, they are positively not to be answerable for any thing but actual intromission, nor for one another — not *singuli in solidum* — a phrase of clear meaning. This surely means something — something more than if there were no such clause. It means distinctly, that, though there may be a formal appearance of intromission, it shall not affect them, unless it be actual in each. No one is to be answerable for what is the actual intromissions of another alone. Now, observe, that when the truster puts in that clause, he knows perfectly well that deeds of sale, discharge, &c. must be signed by a quorum of his trustees. The presumption is, that he puts it in on purpose, because he knows that such deeds may be signed, where some trustees so signing have no actual intromission. These words, it appears to me, must be interpreted, not by legal twists and particularities, but by the plain, common sense meaning of the terms, as they would present themselves to the mind of the truster, or to a plain, honest man, designing to do a gratuitous act of kindness on his friend’s request, if he might be safe to do so. It was so presented to the defenders, being carefully repeated in

the minute of assumption. And, if it were for a moment assumed that the trustee were now here, it may be asked, whether he could set his face to such a gloss on his own plain language, as that it really meant nothing? And if a trustee signed any deed, whereby money could be recovered by his specially intrusted friend, the trustee signing must, by that act alone, become personally answerable for the money, though he never personally received or touched a farthing of it. The pursuer is in the position of the trustee. Can he maintain, with any show of justice, a construction which renders the clause utterly nugatory? But this question, whether there is liability or actual intromission? is the first point, and of vital importance. The first opinion of the consulted Judges mixes it with the supposition of after negligence, and it seems to be so mixed here also. But that is entirely a separate matter, and ought, in my opinion, to be kept distinct. If there is actual intromission, the trustees must account for the money which they are assumed to have got in personal possession, whether they are afterwards negligent or not. But is it the fact, in plain sense? Look at the documents. They are not, as in some other cases, simple deeds of receipt and discharge by the quorum of trustees: they are express, that the money was only paid to Kyd and Taylor in one instance, or Kyd individually in others. In no instance is it left even ambiguous. The defenders are but consenters to the deeds *pro forma*. Again, I ask, are they, in the plain sense of the thing, actual intromitters with the money, uniformly marked as received by Kyd alone? The very point of the clause is, that, though they may concur in such deeds, and must do so, according to the case of Lord Lynedoch, &c. February 15, 1827, that is not to be deemed actual intromission. They are not to be answerable for the acts or intromissions of one another, but only each for his own. Is this an intromission, in very truth, by Dawson, where the money is declared, in the body of the instrument, to be paid only to "me, the said James Kyd?" If it is, I must profess my inability to comprehend what the meaning or purpose of the clause is. It is very necessary to resolve this point precisely, because, if it is against the defenders, there is no need for any question about negligence. And, so far as I understand the case of Pringle, the judgment in it seems to negative this ground of decision, whatever may have been the effect of it in any question of negli-

gence. It certainly appears that Mr Kyd never had any regular factory from the trustees. But I agree with Lord Ivory, Lord Gillies, and Lord Murray, that this is of very little consequence. He had been the testator's factor for many years before his death. He acted, was treated, and expressly designed, as factor in the trust-act. The trust-deed does not prescribe any precise way in which factors are to be appointed. He was, however, recognized and dealt with as the factor of the trustees. In that character expressly, he received the money. Besides this, the clause applies to attorneys (that is, agents) as well as to factors. I have no idea that the express provision of the trust, that the trustees shall not be answerable for the factors or attorneys whom they may authorize to act for them, can be explained away in so palpable a case, merely because there was no formal deed of factory executed. I am therefore of opinion, that there is no case of actual intromission made out. If it were so, the great trusts frequent in this country could never be conducted by respectable men. A small quorum of many trustees, who may voluntarily take on themselves the labour and trouble of the business, may sign deeds of hundreds of thousands of pounds, becoming necessary in the management of such affairs, who never dreamt of that being actual intromission by them. The question of negligence is altogether distinct, and must be kept separate, though entirely mixed with it in the first opinion. Take it, that, within a week or a month after Kyd received the money, the trustees had required him to apply or produce the money, and he then declared himself bankrupt. According to Pringle, and all the opinions in this case, there would be no negligence sufficient to subject the trustees. There would be the most exact diligence. But could it be held that the trustees were liable, as actual intromitters with money, which was declared expressly by the deeds to be received by Kyd alone? I think not. And it reduces this part of the case to a point, which can only be resolved against the defendants, by saying that the clause had no effect at all to distinguish actual intromission by the individual from intromission by any one of his co-trustees, as their factor or agent, as pointedly separated from him, directly in the face of the very words of the trustee's deed, on which the pursuer's title wholly depends.

2. But both the opinions hold, that there is, at any rate, a

personal liability incurred by what is described as *crassa negligentia*, amounting to *culpa lata*. I am aware that such a ground of liability has been admitted, as in the case of Blane and some others; but the amount of the charge should be first fairly regarded. The money was not unnecessarily uplifted from a good security, and then, contrary to the express resolution and the positive direction of the trust-deed, left in the hands of an agent without security, as in the case of Blane, &c. The money here was realized by a sale of certain property for a clear trust-purpose. It never was lent to Kyd, nor authorized to be kept by him; on the contrary, he got it expressly for the purpose of its being applied directly to the trust-purpose—the payment of certain debts. It is said to have been alleged afterwards, that some difficulty had arisen about this, extraneous to any management of the trust; and your Lordship seems to infer that the defenders must have known that the debt had not been paid. I understand that statement to refer to what was stated to them after Kyd's bankruptcy; but it is not averred in this record that the defenders (or Dawson particularly) were in the knowledge that the money had not been so applied. They say they fully believed it had been so, and there is no opposite averment. Then, what is the negligence which is thought so intolerable? The estate was in good management, and there is no loss alleged connected with it. The trustees, believing the debt to be paid, had no demand to make. Kyd, the intrusted friend of the trustee, was in perfect credit. He was intrusted by Dawson in his own affairs, in large pecuniary affairs; yet the Lord Ordinary assumes that the trustees would not have so intrusted him in their own affairs. They did so intrust him in their own affairs; and so the gravamen of this case of *crassa negligentia* is, that the other trustees, relying on Kyd, as the trustee had done, believing their orders to have been complied with, and having no occasion, unless called on for any other purpose, to hold meetings on the trust-affairs, did not, during a number of years, act on a supposition of Kyd being unworthy of credit, which no one else entertained, and call for a strict account of his intromissions and management. But even this matter is assumed far beyond the reality. It is always said that the defenders left the money in Kyd's hands, and did nothing to call him to account during nine years. Is the fact so? The last part

of the money, the large sum of L.900, was only received by Kyd on the 15th August, 1822. He became bankrupt in December, 1827. But long before that, immediately after the death of Mr George Seton, Mr Dawson became anxious to have a meeting of trustees, and a settlement of Kyd's accounts, and began a correspondence with that object in June, 1825; in the course of which, he and Mr Thomson, at his request, made the most urgent demands on Kyd, both for a state of his accounts, and for a meeting of trustees. There is nothing in that correspondence to indicate that Mr Dawson was afraid to go into the inquiry. It only appears, from a letter of Thomson in the end of 1826, that, from the delay in complying with his request, Dawson had taken an impression that there might be some reason for it. But he was surely not then in the state of total neglect of the trust which is imputed to him. Excuses and promises seem to have been given, and still Kyd continued in undoubted credit. The period of negligence is thus reduced to three instead of nine years. Now, I grant that there was here a neglect, a culpable omission of what, in strict duty, might and should have been done. But does this end the question? Did not the trustee distinctly assume that such omissions or neglects, leading to loss or mischief, might occur? But he puts in the clause expressly under a full sense of the infirmities of human nature, and the probability of such things occurring. He not merely declares that the trustees shall not be liable for the consequences of omissions, but he says they shall not be liable for the "neglect of diligence of any kind." That word diligence does not, in my apprehension, mean merely neglect of legal process against debtors; and I think that it is incorrectly translated by the Lord Ordinary. It means diligence in the sense of the Roman law. The trustees are not to be liable in diligence, not "for neglect of diligence of any kind;" that is, not answerable for mere omissions or neglects, but only for positive acts of wrong, unless, indeed, the negligence comes to such a height as to amount to *culpa lata quæ equiparatur dolo*. I see that it is so put in the opinions in the present case; but I can discover nothing resembling it in facts. If the trustees are not answerable as actual intromitters, all that can be imputed to them is, that, with all the world, putting too much confidence in Kyd, they relied on his management and did not call for his accounts, or hold formal

meetings of trustees. What is this but omission, in the only sense in which the clause can give any intelligible protection? All the other friends of the pursuer saw the same, without interference, and the defenders acted in their own affairs in the same belief.

There are many cases, the principle of which is favourable to this view of such a trust. The case of Cowan *v.* Crawford, May 13, 1836, was not nearly so favourable. But, without alluding to other cases, I think I can express the result of my opinion in the present case in the words of Lord Corehouse, in the case of Lord Traquair's Trustees against Cheape, &c. February, 1835:—"As the defenders, therefore, had no actual intromission; as they had transgressed no order of the trustee or the Court; as they were guilty of no fault, except neglect or omission to see that Mr Heriot had lodged his receipts regularly in the bank, which they had directed him to do; as it is not alleged that they had reason to entertain any suspicion of his credit till his bankruptcy took place—there is no ground, in the Lord Ordinary's opinion, for subjecting them to the loss which has occurred. From exuberant confidence in their factor, they acted imprudently and carelessly, but it was an omission only; and certainly it was no act of transgression, far less a dishonourable act."

Lord Meadowbank concurred with the Lord Justice-Clerk.

The Court adhered, finding no expenses hitherto due, and remitted to the Lord Ordinary to proceed further in the cause.¹

¹ As reported, 3 D. 310.

DEED OF FACTORY.

I, _____, trustee appointed by _____, for behoof of _____ and as such standing infest and seised in the lands and estates of _____, and others after mentioned, conform to the trust-disposition and settlement granted by the said _____ in my favour, as trusteeforesaid, bearing date the ____ day of ____, and instrument of sasine proceeding thereon, dated the ____, and recorded in the general register of sasines at Edinburgh the ____ days of the said month of ____ ; by which trust-deed I am specially empowered and authorized to appoint a factor or factors for the purposes under written, do hereby nominate, and constitute, and appoint _____ to be my factor to the effect under written : That is to say, giving, granting, and committing to the said _____ full power, warrant, and commission for me, and in my name, as trusteeforesaid, to collect, levy, and uplift, and, if necessary, to call, charge, and pursue for the rents, mails, farms, profits, and duties of the towns, lands, &c. of _____, and other towns, lands, fishings, and others belonging to the said _____, and disponed by him to me, as trusteeforesaid, by the foresaid trust-disposition, all lying within the parish of _____ and sheriffdom of _____, and that for all crops and years bygone resting unpaid, and in time coming during the subsistence of the said trust and of these presents, with power to the said _____, upon payment of the said rents and duties, to grant receipts and discharges for the same, which shall be sufficient to all concerned : and further, I do hereby authorize and empower the said _____ to attend for and represent me as trusteeforesaid, at all county, parish, district, and road meetings, in which I, as trusteeforesaid, am or may be anywise interested,

and to act and vote for me at all such meetings as to him shall seem expedient, and in general to do every thing that may be necessary, in and concerning the premises, as fully and freely in all respects as I, as trustee foreaid, could do if personally present; declaring always, as it is hereby expressly provided and declared, that the said _____ shall be bound and obliged, as by acceptation hereof he binds and obliges himself, and his heirs, executors, and successors, to hold just count, reckoning, and payment to me as trustee foreaid, or to my successors in office, at all times when required, for his whole intromissions in virtue hereof; and I consent to the registration hereof in the Books of Council and Session, or others competent, for preservation, and for that purpose constitute _____ my procurators. In witness whereof,
&c.

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THE END.

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